

SWEATSHOP LIABILITY: CORPORATE CODES OF CONDUCT
AND THE GOVERNANCE OF LABOR STANDARDS IN THE
INTERNATIONAL SUPPLY CHAIN

by
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Outsourcing the manufacture of apparel to suppliers in developing countries is a common practice among multinational corporations (MNCs). MNCs leverage cheap labor and lax regulations abroad to support a business model that prioritizes low costs to maximize profits. While this strategy has been successful to date, external costs threaten its continued viability. This Comment observes that apparel outsourcing contributes to an international infrastructure of sweatshop labor, characterized by unsafe and exploitative labor conditions for millions of workers. MNCs recognize that Americans are uneasy about sweatshop labor conditions, as evidenced by national polls and consumer purchasing practices. Perhaps the most prominent response by MNCs has been the voluntary adoption of codes of conduct that declare minimum labor standards for suppliers, typically self-enforced by the MNC or a monitoring company hired by the MNC.

This Comment argues that the current implementation of these codes fails to eliminate sweatshop conditions and leaves MNCs that rely on them vulnerable to the costs of superseding government oversight and civil liability. Following an analysis of these risks, this Comment concludes that MNCs may preserve the privilege of self-regulation and avoid costly lawsuits by adopting a business model that prioritizes sustainability and refashioning their codes of conduct to support that model.

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I. INTRODUCTION

The late twentieth and the early twenty-first centuries have seen increasing economic globalization in the form of both globally extended capital markets and extended outsourcing of production in global supply systems across the world. After three decades of predominant liberalist orientation, the international economy remains strongly pro-commercially biased. International governance of social and environmental concerns has been relatively much weaker... while... CSR [Corporate Social Responsibility] and business self-regulation have rapidly expanded.¹

American consumers want lower prices, and multinational corporations (MNCs) want higher profits. The emerging global labor market can advance both objectives with a large supply of overseas workers willing to produce goods more cheaply than the domestic labor market. In the apparel industry, leading MNCs based in the United States, such as Nike, Wal-Mart, and The Gap, contract with hundreds of suppliers in developing countries that operate outside the scope of American labor law. While proponents of these international supply chains emphasize the benefits of low-cost products for consumers and an influx of capital to facilitate development and generate wealth in developing countries, critics point to the industry norm of sweatshop labor that enriches corporate executives at the cost of social justice. In response to public demand, MNCs have broadly employed corporate codes of conduct that establish labor standards for their international suppliers.

In practice, Professor Atle Midttun suggests that corporate self-regulation has failed to produce social and environmental standards on the global economy that measure up to the expectations of advanced welfare nations, leaving MNCs vulnerable to “moral attacks” and “economic costs” for failure to meet minimal standards.² This view resonates in the American experience, where the anti-sweatshop movement has been successful in mounting legal and political campaigns for greater accountability of MNCs that contract with sweatshops.³

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¹ Atle Midttun, *Partnered Governance: Aligning Corporate Responsibility & Public Policy in the Global Economy*, 8 CORP. GOVERNANCE 406, 406–07 (2008), available at <http://www.emeraldinsight.com/Insight/viewPDF.jsp?contentType=Article&FileName=html/Output/Published/EmeraldFullTextArticle/Pdf/2680080406.pdf>.

² *Id.* at 407–08, 416. Professor Midttun is a faculty member at the Norway School of Management. *Id.* at 406.

³ The U.S. government defines a domestic sweatshop as a “business that regularly violates BOTH safety or health AND wage or child labor laws.” U.S. GEN. ACCOUNTING OFFICE, “SWEATSHOPS” IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE

Continuing public interest in sweatshops influences public policy, and novel legal theories to challenge corporate conduct are gaining momentum in state and federal courts.

Corporate liability for contracting with sweatshops is a newly unfolding area of law of concern to corporations, labor and employment, international litigation, human rights, and consumers. Existing legal scholarship considers the effectiveness of codes of conduct to improve labor conditions, but offers less attention to business interests and provides no comprehensive analysis on corporate codes of conduct as a sustainable instrument of international governance. This Comment evaluates the legal risks posed to corporations that rely on codes of conduct to maintain control of the labor market. It concludes that recent legal and political developments pose a tangible threat to MNCs, but that codes of conduct can avoid costly litigation and burdensome government oversight if implemented with the goal of business sustainability.

Part II describes the role of corporate codes of conduct as an instrument of self-regulation in the supply chain and summarizes their development from short, aspirational statements to their current contractual form. This Part explains why MNCs are invested in codes of conduct and their potential to dissociate brand image from harmful associations with sweatshops and provide MNCs with a cost-effective alternative to the uncertainty and rigidity of government oversight. Despite their promise, this Part argues that inadequate monitoring and enforcement efforts fail to improve labor standards or satisfy stakeholder expectations.

Part III analyzes developing legal claims that seek to hold MNCs liable for failing to enforce codes of conduct under six causes of action: (1) Alien Tort Claims Act (ATCA); (2) Racketeer Influenced and Corrupt Organizations Act (RICO); (3) state laws on false advertising and unfair competition; (4) common law torts; (5) third-party beneficiary breach of contract; and (6) unjust enrichment. Part III recognizes that some causes of action are more viable than others, but concludes that MNCs in the apparel industry should be aware of this rising tide. Analyzing each of the theories in turn, this Part suggests the nature and degree of risk facing MNCs.

Part IV cautions MNCs that even favorable outcomes in the courtroom can be costly as they draw public attention to the lack of government oversight over the sale of products manufactured in sweatshops. This Part discusses the increase in government efforts to

ENFORCEMENT OPTIONS 16 (1988) [hereinafter GAO REPORT], *available at* <http://archive.gao.gov/d17t6/136973.pdf>. In light of less stringent labor laws in the developing countries where MNCs typically contract suppliers, international sweatshops include factories that comply with domestic labor laws, but fail to “pay a living wage in safe working conditions, enforce reasonable work hours, provide for sick leave and maternity leave, and allow workers to organize” CO-OP AMERICA, GUIDE TO ENDING SWEATSHOPS 18, <http://www.greenamericatoday.org/PDF/EndingSweatshops.pdf>.

discourage or penalize MNCs engaged in the sweatshop trade when self-regulation does not, focusing on the growth of sweatshop-free procurement policies, the availability of sanctions under the Federal Trade Commission Act, the Federal Corrupt Practices Act, and proposed federal legislation. This Part concludes that legislative activity threatens to supplant self-enforced codes of conduct by squeezing sweatshop-produced goods out of the domestic market and restricting the ability of MNCs to self-regulate the industry.

Part V proposes that codes of conduct can and should be preserved as a workable means of governing the international supply chain. To achieve this objective, it argues that MNCs should modify their implementation of codes of conduct to align with a model of globalization that prioritizes business sustainability and balances economic and social justice concerns. Four essential commitments underlie sustainable self-regulation: accurate planning, fair wages, efficient monitoring, and effective enforcement.

Part VI concludes with a call to action. Now is the time for MNCs to evaluate and improve the implementation of their codes of conduct before liability can be established and before competing models of governance replace self-regulation.

II. CODES OF CONDUCT PROVIDE AN EFFECTIVE INSTRUMENT FOR SELF-REGULATION

Sweatshops in the supply chain are an outgrowth of emerging international markets without external regulation. Public exposure of abysmal labor conditions in supply factories marked the beginning of a dialectic between MNCs and competing stakeholders to establish authority and regulation. Exposure created public demand for “sweat-free” products, which in turn spurred development of self-regulating corporate codes of conduct. Critics of half-hearted implementation of the codes prompted further public demand, and the cycle continued, ultimately resulting in private lawsuits and government intervention. This Part discusses the development and evolution of codes of conduct.

A. *Codes of Conduct Fill a Gap in International Law*

The rapid growth of the global marketplace has outpaced the instruments of governance, allowing corporations to profit in the interim from unregulated and cheap labor.⁴ The International Labour Organization (ILO) developed comprehensive labor standards through its conventions and recommendations, but the agency lacks enforcement

⁴ See Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 206–07 (2004).

capability.⁵ The World Trade Organization (WTO) can impose economic sanctions, but has rejected linkages between trade conditions and labor standards, pointing to the ILO as a more appropriate oversight body.⁶ Other mediums of international law, such as multilateral trade agreements and unilateral trade conditions imposed on foreign trading partners, also fail to strengthen labor standards because they propose policies to foreign governments that fail to account for the particular social and economic conditions in those countries.⁷ The application of U.S. law is limited to its domestic borders unless “clearly expressed” congressional intent establishes extraterritorial application of federal statutes.⁸ Generally, U.S. law with extraterritorial application covers U.S. citizens only, not foreign nationals.⁹ The most prominent exception to this rule is the Alien Tort Claims Act, which allows foreign nationals to bring claims against U.S. corporations in U.S. courts for injuries occurring outside of the United States.¹⁰

In place of international and domestic law, corporate self-regulation suits the current model of globalization that prioritizes efficiency and the pursuit of profits.¹¹ Proponents of this liberal economic model emphasize growth opportunities for the American economy arising from a large supply of overseas workers willing to produce goods more cheaply than the domestic labor market. Likewise, the influx of capital abroad facilitates development and generates wealth in developing countries. These benefits are tempered, however, by corporate exploitation of less

⁵ See ILO, *Applying and Promoting International Labour Standards*, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandPromotingInternationalLabourStandards/lang-en/index.htm.

⁶ See Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 133, 166–67 (1999); Andrew G. Brown & Robert M. Stern, *What Are the Issues in Using Trade Agreements to Improve International Labor Standards?*, 7 WORLD TRADE REV. 331, 332 (2008), available at <http://journals.cambridge.org/action/displayIssue?jid=WTR&volumeId=7&issueId=02&iid=1837968>.

⁷ Brown & Stern, *supra* note 6, at 352–55.

⁸ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (affirming the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949)). See also *Labor Union of Pico Korea, Ltd. v. Pico Prods., Inc.*, 968 F.2d 191, 194 (2d Cir. 1992) (finding that courts should consider all evidence of legislative intent, but the plaintiff has the burden to demonstrate Congress intended extraterritorial application); Jack A. Raisner, *Extraterritoriality of Federal and State Labor-Related Laws, Generally*, in 1 INTERNATIONAL LABOR & EMPLOYMENT LAWS 50-3 to -4 (William L. Keller et al. eds., 2d ed. 2003).

⁹ For example, the Fair Labor Standards Act (FLSA) does not apply to any employment services performed in a foreign country. 29 U.S.C. § 213(f) (2006). But Title VII applies to U.S. citizens employed in a foreign country by a U.S. employer. Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2006).

¹⁰ 28 U.S.C. § 1350 (2006). See discussion *infra* Part III.B.1.

¹¹ Midttun, *supra* note 1, at 406–07.

stringent labor standards outside of the United States that fosters an industry norm of sweatshop labor.

B. Corporate Self-Regulation Prioritizes Business Interests

MNCs recognize that cheap labor comes with a cost. In response to the sweatshop exposure campaigns of the mid-1990s,¹² protests at the 1999 WTO meeting in Seattle,¹³ and ongoing demands for CSR, many MNCs have adopted codes of conduct for their suppliers. Codes of conduct are instruments of private ordering that allow corporations to regulate themselves and respond incrementally to consumer demands that otherwise might precipitate more restrictive regulations.

1. Socially-Conscious Brand Image

Codes of conduct establish a marketable brand image of social consciousness. Consumers and investors shop with their conscience and care about labor practices.¹⁴ For companies that rely on their brand name, success depends on evoking a positive emotional response from consumers.¹⁵ For some apparel corporations, brand image is a core asset.¹⁶

¹² Perhaps the most visible campaign followed Kathie Lee Gifford's unexpected sobbing on national television when she learned that Wal-Mart's line of clothing in her name was produced by a sweatshop in Honduras. See B. J. Bullert, *Strategic Public Relations, Sweatshops, and the Making of a Global Movement* 6–7 (The Joan Shorenstein Center on the Press, Politics and Public Policy Working Paper Series, Paper No. 14, 2000), available at http://www.hks.harvard.edu/presspol/publications/papers/working_papers/2000_14_bullert.pdf.

¹³ See, e.g., David Postman et al., *Police Haul Hundreds To Jail—National Guard On Patrol; 1,000 Protesters Enter Restricted Zone*, SEATTLE TIMES, Dec. 1, 1999, at A1.

¹⁴ See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 640–41 (2004) (“[M]any consumers have come to view themselves as purchasing . . . not only products, but also shares of responsibility in the moral and ecological economy that produces them. . . . [I]nformation regarding processes increasingly is finding its way downstream. Consumers are responding accordingly.”); Jason A. Cade, Note, *If the Shoe Fits: Kasky v. Nike and Whether Corporate Statements About Business Operations Should Be Deemed Commercial Speech*, 70 BROOK. L. REV. 247, 263–64 (2004) (social investors associate social factors with higher quality management and higher returns on investment; professionally-managed social investment assets in 2003 were valued at \$2.16 trillion).

¹⁵ Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 389 (2006); see also Midttun, *supra* note 1, at 407 (arguing idealistic stakeholder organizations have public legitimacy through the media as representatives of the “general will” of the people with the moral right to demand corporate social responsibility).

¹⁶ THEODORE H. MORAN, BEYOND SWEATSHOPS: FOREIGN DIRECT INVESTMENT AND GLOBALIZATION IN DEVELOPING COUNTRIES (2002), reprinted in JAMES ATLESON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY, 481–82 (2008). One estimate suggests in the international fashion industry, thirty percent of stock value is based on reputation. Poulomi Mrinal Saha, *Supply Chain Management—Weak Links in Bangladesh*, ETHICAL CORP., Feb. 5, 2007, available at <http://www.ethicalcorp.com/content.asp?ContentID=4865>.

Nike's experience during the 1990s illustrates the harmful economic consequences to a corporation that dismisses sweatshop allegations. When CEO Phil Knight first was accused of running sweatshops at Nike's Indonesian factories, he denied responsibility for the practices of their contractors.¹⁷ However, the company's position changed when widespread associations between Nike, child labor, and women's exploitation caused the company's capitalized value and brand reputation to plummet, leading Nike to initiate a public relations campaign and adopt a code of conduct in 1992.¹⁸ The company's ill-gained reputation was hard to shake, evidenced by a 1996 debate by the Portland Public School Board on whether to reject a multimillion dollar donation from Nike because of its practice to contract with sweatshops.¹⁹ As late as 1998, Knight publicly acknowledged that "[t]he Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse."²⁰ Since then, the company has become an industry leader in CSR and now identifies the "power of the Nike brand" as "a competitive strength."²¹

Transparency assures consumers and investors that MNCs abide by their publicly expressed commitment to social justice. For Cintas Corp., one of the world's largest uniform suppliers,²² it took a back-firing lawsuit to recognize the value of inviting public scrutiny. Cintas sued the Senior Vice President of a "socially-conscious" investment company for asserting that Cintas used sweatshop labor in Haiti, seeking damages and an injunction to prevent dissemination.²³ Not only did the suit end in a

¹⁷ Bill Baue, *Michael Conroy on Activist Campaigns and the Certification Revolution*, SOCIAL FUNDS, June 2, 2008, <http://www.socialfunds.com/news/article.cgi/2514.html> (interview with Michael Conroy, author of *Branded! How the "Certification Revolution" is Transforming Global Companies*).

¹⁸ *Id.*; see also Piety, *supra* note 15, at 392–93; Cade, *supra* note 14, at 258–59; Nike, Inc., *Workers & Factories: Improving Conditions in Our Contract Factories*, https://secure.nikebiz.com/responsibility/workers_and_factories.html.

¹⁹ Although the school district ultimately decided to maintain its relationship with Nike, the company faced the potential of an embarrassing shunning in its own headquarter city. Joy Estimada, *Rights Commission Wants Schools to Just Say No to Nike*, PORTLAND BUS. J., July 26, 1996, <http://www.bizjournals.com/portland/stories/1996/07/29/tidbits.html>.

²⁰ John H. Kushman, Jr., *Nike Pledges to End Child Labor and Apply U.S. Rules Abroad*, N.Y. TIMES, May 13, 1998, at D1.

²¹ *Nike Announces Restructuring*, ATLANTA BUS. CHRONICLE, Feb. 11, 2009, available at <http://atlanta.bizjournals.com/atlanta/stories/2009/02/09/daily58.html>; see, e.g., Andy Giegerich, *Parker: Nike Could Hit \$23 Billion by 2011*, PORTLAND BUS. J., Feb. 6, 2007, <http://portland.bizjournals.com/portland/stories/2007/02/05/daily13.html> (quoting Nike CEO Mark Parker at an investors conference stating: "We'll get there by product and by our brand").

²² William Baue, *Cintas Defamation Suit Challenges Shareowner Free Speech Rights*, SOCIAL FUNDS, Feb. 10, 2004, <http://www.socialfunds.com/news/print.cgi?sfArticleId=1339>.

²³ See Rachel Beck, *Rachel Beck: Lawsuit May Muzzle Investors Who Say What's on Their Minds*, AZ. DAILY STAR, Apr. 13, 2004, <http://www.azstarnet.com/sn/printDS/17799>; Baue, *supra* note 22.

settlement with no monetary compensation to Cintas, it probably resulted in more publicity of the accusations than doing nothing would have produced.²⁴ Moreover, within days of the settlement, Cintas wholly reversed its initial position when it endorsed a shareholder resolution to the Securities and Exchange Commission to establish mandatory reporting on its adherence to its “Code of Conduct for Vendors.”²⁵ The lesson from Cintas for MNCs is to focus on initiatives to improve labor conditions without trying to hide violations.

2. *Responsive to Market Changes*

Codes of conduct provide a desirable alternative to more costly types of regulation. Altruistic commitment to social justice is not the primary motivation of MNCs to adopt codes of conduct.²⁶ Rather, MNCs value the opportunity to preserve free market competition.²⁷ Without external regulation, corporations can respond quickly to market changes and maximize profit. Also, codes of conduct respond directly to demands for CSR, making them an asset in public relations.²⁸

Codes of conduct also satisfy the rational economic interests of the U.S. government, foreign governments, and factory workers to maximize wealth. The U.S. government prioritizes U.S. business interests in global markets, including cheaper labor costs, even when directly pitted against

²⁴ William Baue, *About Face: Cintas Settles Lawsuit and Supports Vendor Standards Resolution*, SOCIAL FUNDS, Sept. 15, 2004, <http://www.socialfunds.com/news/print.cgi?sfArticleId=1515>. See also, *Citizens Advisers Encouraged by Cintas' Plans to Disclose Information on Overseas Workplace...*, BUS. WIRE, Aug. 24, 2004, available at <http://www.allbusiness.com/company-activities-management/business-ethics/5205829-1.html>.

²⁵ Baue, *supra* note 24.

²⁶ See, e.g., DAVID F. MURPHY & DAVID MATHEW, NIKE AND GLOBAL LABOUR PRACTICES: A CASE STUDY PREPARED FOR THE NEW ACADEMY OF BUSINESS INNOVATION NETWORK FOR SOCIALLY RESPONSIBLE BUSINESS 6 (2001), available at <http://www.new-academy.ac.uk/publications/keypublications/documents/nikereport.pdf> (noting Nike's motivation to develop a code of conduct was “a mixture of internal concerns and aspirations for improvement of labour conditions, and external media and activist pressure on the company”); see also Clive Crook, *The Good Company: A Skeptical Look at Corporate Social Responsibility*, THE ECONOMIST, Jan. 22, 2005, http://www.economist.com/PrinterFriendly.cfm?story_id=3555212 (arguing corporate social responsibility is at best “little more than a cosmetic treatment” for most MNCs and potentially an undesirable reform on capitalism).

²⁷ J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the NAD Annual Conference 2008: Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement, 1, 12 (Sept. 23, 2008), available at <http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf> (“Self-regulatory initiatives also make good business sense. The more energy an industry puts into regulating itself, the less chance the government will get involved in trying to legislate the same results.”).

²⁸ *Id.* (“[D]eveloping and implementing self-regulatory initiatives can protect and improve an industry's reputation and goodwill with consumers.”). See also Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 613 (2000) (discussing corporations' willingness to adopt corporate codes).

the U.S. interest in protecting international human rights.²⁹ For example, when the Clinton Administration renewed China's most-favored nation status in 1995 over the opposition of human rights groups, it offered them a toothless consolation prize, the Model Business Principles initiative to encourage fair employment practices abroad.³⁰ As Federal Trade Commissioner J. Thomas Rosch noted, "Self-regulation can be the most appropriate or effective method of addressing issues that otherwise would be difficult for law enforcement to manage because of constitutional, statutory or other political limitations."³¹

Governments of developing countries also welcome the free market because it allows them to court international capital investment with cheap labor and lax labor regulations.³² Even workers in supplier factories have a rational basis to accept sweatshop conditions over the possibility of unemployment if costly regulation destroys the cost advantage of international manufacturing contracts. In sum, for many stakeholders, codes of conduct present a less intrusive, more flexible way of regulating the supply chain than formal and more rigid alternatives.

3. *Flexibility to Evolve with Public Demands*

Codes of conduct provide flexibility to evolve with public demand. In their short history, codes of conduct have undergone a substantial transformation. The concept of a corporate code of conduct emerged during the 1970s and 1980s in response to concerns raised by governments of developing countries and human rights groups about MNCs practices in the global market.³³ Early codes of conduct were created by third-party organizations to provide a model for corporate behavior. These codes were general in nature and not designed as

²⁹ For example, see Senator Feinstein's remarks in favor of ATCA reform on grounds that suits "brought by foreigners for massive monetary damages[] threaten the international economic activities that are important to sustaining the American economy." 151 CONG. REC. S11,435 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein).

³⁰ Lu, *supra* note 28, at 613–14. The Model Business Principles had a lukewarm reception by large corporations, which merely acknowledged the Model Business Principles as "a useful reference point" for developing voluntary codes of conduct. Paul Lewis, *U.S. Provides First Details of Its Business Ethics Code*, N.Y. TIMES, May 27, 1995, at 36, available at <http://query.nytimes.com/gst/fullpage.html?res=990CEEDD1E31F934A15756C0A963958260>.

³¹ Rosch, *supra* note 27, at 14.

³² Lu, *supra* note 28, at 605–06. See, e.g., Saha, *supra* note 16 (noting Bangladesh's delay to increase the minimum wage of \$25 per month, the lowest in the world, while adopting a labor bill to increase daily working hours to 10, mandate overtime, restrict union rights, and reduce the retirement age from 60 to 57).

³³ Jorge F. Perez-Lopez, *Corporate Codes of Conduct on Labor Standards*, in 1B INTERNATIONAL LABOR & EMPLOYMENT LAWS 95-2 to -3 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (among the first voluntary codes of conduct to address labor standards by U.S. companies operating abroad were the Sullivan Principles in South Africa, the MacBride Principles in Northern Ireland, the Slepak Principles in the Soviet Union, and the Maquiladora Standards of Conduct in Mexico and Central America).

enforceable commands. For example, the Global Sullivan Principles of Social Responsibility encouraged MNCs “to support economic, social and political justice by companies where they do business”³⁴ Similarly, the United Nations Global Compact asked companies “to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption.”³⁵ The U.N. Global Compact is not legally binding, but rather “is designed to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships.”³⁶ MNCs could endorse these codes of conduct without committing to any conduct or expense.

Capitalizing further on the CSR movement, some corporations began to develop individualized codes of conduct to govern themselves. Like earlier codes, these were typically short and general, more aspirational than directive. Levi Strauss & Co. was among the first:³⁷

We are committed to ensuring that all of our suppliers around the world meet our code of conduct at all facilities involved in the production of our branded products. Through the application of our Global Sourcing and Operating Guidelines, our goals are to:

- ensure that all individuals involved in the production of the goods we sell are treated with dignity and respect and enjoy safe and healthy working conditions;
- minimize our impact on the environment; and
- achieve positive results and effect change by working with business partners and community organizations to find long-term solutions to specific and systemic problems in factories.³⁸

The emergence of individualized statements marked a conceptual leap forward in corporate social responsibility that paved the way for self-regulation bounded by public scrutiny and reliance.

As the anti-sweatshop movement gained momentum, codes of conduct evolved further. MNCs now use codes of conduct as an instrument to set guidelines for their suppliers. These codes look more contractual than aspirational and may include obligations and

³⁴ The Leon H. Sullivan Foundation, The Global Sullivan Principles, <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp>.

³⁵ United Nations Global Compact, The Ten Principles of the UN Global Compact, <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index.html>.

³⁶ United Nations Global Compact, About the Global Compact: Frequently Asked Questions, <http://www.unglobalcompact.org/AboutTheGC/faq.html>.

³⁷ See Levi Strauss & Co., Product Sourcing Practices, <http://www.levistrauss.com/Citizenship/ProductSourcing.aspx> (“In 1991, [Levi Strauss & Co.] became the first multinational apparel company to establish a comprehensive ethical code of conduct for our [manufacturing and finishing] contractors.”).

³⁸ Levi Strauss & Co., Code Application, <http://www.levistrauss.com/Citizenship/ProductSourcing/CodeApplication.aspx>.

expectations for both parties. For example, Gap Inc. established a “Code of Vendor Conduct” that not only “sets forth the basic requirements that all factories must meet in order to do business with Gap Inc.,” but also “provides the foundation for Gap Inc.’s ongoing evaluation of a factory’s employment practices,” for which it “will continue to develop monitoring systems to assess and ensure compliance.”³⁹ Nike’s code of conduct expresses general goals for itself and more specific expectations for its contractors. It begins with a company statement of purpose and broad goals:

NIKE designs, manufactures and markets products for sports and fitness consumers. At every step in that process, we are driven to do not only what is required by law, but what is expected of a leader. We expect our business partners to do the same. NIKE partners with contractors who share our commitment to best practices and continuous improvement in:

1. Management practices that respect the rights of all employees, including the right to free association and collective bargaining
2. Minimizing our impact on the environment
3. Providing a safe and healthy work place
4. Promoting the health and well-being of all employees.⁴⁰

Nike’s code then provides standards for its contractors concerning forced labor, child labor, compensation, hours of work/overtime, environment, safety and health, and documentation and inspection.⁴¹

According to the U.S. Department of Labor, specific labor standards established in codes of conduct vary by company, but some or all of the following provisions are in various codes:

- (1) prohibitions on child labor;
- (2) prohibitions on forced labor;
- (3) prohibitions on discrimination based on race, religion, or ethnic origin;
- (4) requirements to ensure the health and safety of the workplace;
- (5) provisions on wages, usually based on local laws regarding minimum wage or prevailing wage levels in the local industry;
- (6) provisions regarding limits on working hours, including forced overtime, in accordance with local laws; and
- (7) support for freedom of association and the right to organize and bargain collectively.⁴²

³⁹ GAP INC., GAP INC. CODE OF VENDOR CONDUCT, http://www.gapinc.com/public/documents/code_vendor_conduct.pdf. Likewise, Levi’s Global Sourcing and Operating Guidelines provide Terms of Engagement that are “requirements . . . applied to every contractor who manufactures or finishes products for [Levi Strauss & Co.].” LEVI STRAUSS & CO., LEVI STRAUSS & CO. GLOBAL SOURCING AND OPERATING GUIDELINES, <http://www.levistrauss.com/Downloads/GSOG.pdf>.

⁴⁰ NIKE, INC., 2007 NIKE, INC. CODE OF CONDUCT, http://www.nikebiz.com/responsibility/documents/Nike_Code_of_Conduct.pdf.

⁴¹ *Id.*

⁴² BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T OF LABOR, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM? iv

Through this process of evolution, codes of conduct have become the framework for self-regulation in the international supply chain.

C. Operational Challenges Limit Code of Conduct Success

The biggest shortcoming of corporate codes of conduct is their failure to eliminate sweatshop conditions from supplier factories.⁴³ While MNCs have substantially expanded monitoring of supplier compliance with codes, their efforts to enforce or remedy violations are comparatively minimal.⁴⁴

1. Monitoring Labor Conditions

Codes of conduct spurred the development of an entire new industry of monitoring supplier compliance.⁴⁵ Three issues concerning monitoring merit attention: objectivity, accuracy, and transparency. The objectivity of monitoring is at issue when MNCs monitor their suppliers directly or hire independent monitors, both of which raise suspicion that “the fox is guarding the henhouse,” because MNCs benefit from a report that suppliers are in compliance. Accuracy of findings may be derivative of objectivity, but methodological problems inherently risk insufficient or incorrect results as well. Critics point out that MNCs find greater compliance when they schedule inspections and allow their suppliers to

(1996), available at <http://www.dol.gov/ILAB/media/reports/iclp/apparel/apparel.pdf>.

⁴³ For example, between 2004–2005, neither Wal-Mart nor The Gap saw any changes in wages and work hours, and Wal-Mart saw an increase in code violations overall. Rachelle Jackson, *Labour Standards—More News Is Not Always Good News*, ETHICAL CORP., Oct. 4, 2007, available at http://www.ethicalcorp.com/content_print.asp?ContentID=5410; see also FAIR LABOR ASS'N, 2007 ANNUAL REPORT 10–11 (Nov. 2007), available at http://www.fairlabor.org/images/WhatWeDo/2007_annual_publicreport.pdf (reporting 2,511 separate violations of its own code of conduct in 2006 over 147 factory visits, including 1,151 violations in health and safety code element, 419 in wages and benefits, 230 in code awareness, 106 in harassment or abuse, 98 in overtime compensation, 98 in freedom of association and collective bargaining, 61 in forced labor, 49 in child labor, 35 in nondiscrimination, and 54 miscellaneous). For examples of sweatshop conditions in the apparel industry, see SWEATFREE COMMUNITIES, SWEATSHOP HALL OF SHAME: INDUCTEES FOR 2008, http://www.sweatfree.org/docs/Hall_of_Shame_Final_11%2718%2707.pdf; see also Pagnattaro, *supra* note 4, at 208.

⁴⁴ See, e.g., Richard M. Locke & Alvin J. Siteman, *The Promise and Perils of Globalization: The Case of Nike* 8–9 (MIT Sloan Sch. of Mgmt. 50th Anniversary Research Paper, 2002), available at <http://web.mit.edu/polisci/research/locke/nikepaperFINAL.pdf> (noting criticism against Nike for failing to enforce its code); see also Bill Baue, *BSR Proposed Going Beyond Monitoring to Achieve Truly Sustainable Supply Chains*, SOCIAL FUNDS, July 24, 2007, <http://www.socialfunds.com/news/print.cgi?sfArticleId=2334> (discussing a report of Business for Social Responsibility that advocates a shift from periodic surveillance to a “comprehensive, systemic change toward positive practices”).

⁴⁵ Many codes of conduct are unaccompanied by any system for monitoring. See Joe Phillips & Suk-Jun Lim, *Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees*, 61 RUTGERS L. REV. 333, 338–39 (2009).

prepare viewing areas and workers who will be available to interview.⁴⁶ However, any monitoring program will confront difficulties when a company contracts with more than seven-hundred factories: the sourcing locations constantly change, the standards provided in codes of conduct undergo frequent revision, and the inspectors vary by location.⁴⁷ Some MNCs address these criticisms by making their monitoring process more transparent. For example, Nike released names and locations for all of its contract factories in 2005.⁴⁸

Multi-stakeholder initiatives are another approach to monitoring. These initiatives bring together MNCs, trade unions, human rights groups, consumer organizations, and other civil society entities to monitor collectively under uniform standards.⁴⁹ For example, the Fair Labor Association (FLA) emerged from a 1996 initiative by the Clinton Administration—the Apparel Industry Partnership (AIP), that produced a multi-company code of conduct, monitoring and certification system in 1998.⁵⁰ Some labor and religious organizations that participated in AIP advocated for higher labor standards and more transparent monitoring than the FLA adopted and consequently split from that group.⁵¹ The Workers Rights Consortium (WRC) formed as an alternative to the FLA for university-licensed apparel. The WRC expressly excluded MNCs from its membership, asserting that corporate influence over the FLA interfered with accurate reporting on factory compliance.⁵² The WRC has

⁴⁶ Dusty Kidd, Director of Nike's labor practice department, defended announced visits, arguing the practical reality of unannounced visits is that the supplier contact is not available, they need a day to get the records together, and they use that time to warn other workers that the inspector is there. MURPHY & MATHEW, *supra* note 26, at 11.

⁴⁷ MURPHY & MATHEW, *supra* note 26, at 11; *see also* Jackson, *supra* note 43; Locke & Siteman, *supra* note 44, at 8–9 (noting very short-term contracts and limited orders affects Nike's ability to monitor the production processes and working conditions).

⁴⁸ Nike's disclosure was received with cautious optimism by stakeholders. Neil Kearney, general secretary of the International Textile, Garment and Leather Workers' Federation called the disclosure "groundbreaking," but wanted to see whether other major brand names and retailers would follow suit. Helen Jung, *Nike Casts Light on Factories*, THE OREGONIAN, Apr. 13, 2005, at A1. Michael Posner, executive director of Human Rights First, said "[w]e're 15 years into a process that's going to take decades, . . . but the forward progress is clear." *Id.*; *see also* Lisa Roner, *The Nike Factory Challenge*, ETHICAL CORP., May 16, 2005, http://www.ethicalcorp.com/content_print.asp?ContentID=3690 ("Despite widespread accolades for the factory disclosure, . . . the Kenan Institute of Private Enterprise [affiliated with the University of North Carolina-Chapel Hill Business School] says it 'does little to actually change the deplorable conditions in the factories where Nike produces its athletic wear.'").

⁴⁹ MORAN, *supra* note 16, at 526–30 (describing the main stakeholder code initiatives, including the Fair Labor Association, Worker Rights Consortium, Social Accountability International, Ethical Trading Initiative, Clean Clothes Campaign, and Rugmark).

⁵⁰ *Id.* at 527.

⁵¹ *Id.*

⁵² Steven Greenhouse, *Nike's Chief Cancels a Gift Over Monitor of Sweatshops*, N.Y. TIMES, Apr. 25, 2000, at A16.

been more aggressive than the FLA in investigating factory conditions and making its findings public.⁵³

Monitoring systems are designed to protect an industry from more stringent oversight by government. However, court-oversight is not unprecedented. For instance, in a 2003 settlement between factory workers in the United States Commonwealth of Saipan and twenty-six apparel retailers, the parties agreed to create an oversight board of three retired judges.⁵⁴ Negotiations were rife with disagreement on who should conduct the monitoring.⁵⁵ Unless private initiatives to monitor compliance with codes of conduct become objective, accurate, and transparent, MNCs will remain vulnerable to external sources of oversight.

2. *Enforcing Codes of Conduct*

Corporate efforts to monitor compliance provided an essential baseline to document poor labor conditions during the early years of implementing codes of conduct, but MNCs have made little progress on remedying violations.⁵⁶ Nike acknowledges in its fiscal report for 2005–2006 that “[c]omprehensive monitoring in and of itself will not result in sustainable improvements for workers.”⁵⁷ While the company pledges to examine the root causes of sweatshop practices and aims for systemic change, the report also notes that “no one—in our industry, trade unions or non-governmental organizations—has yet found a way to demonstrate

⁵³ Perez-Lopez, *supra* note 33, at 95-11, 95-15. See the WLC website for more information at <http://www.workersrights.org>. To illustrate the rivalry between the two organizations, when the University of Oregon joined the WRC, Phil Knight reneged on a multi-million dollar pledge to build the new sports stadium. Nike maintained that it opposed the WRC because it did not allow companies to join and it used a “gotcha” monitoring system that “is not a serious way to achieve the common goal that we all want to achieve, which is to eradicate sweatshop conditions.” Greenhouse, *supra* note 52. In the end, the University of Oregon stepped down from the WRC, and Nike reinstated the donation. John Liebhart, *Frohnmayr: “It’s a Very Happy Day for Us,”* OR. DAILY EMERALD, Sept. 27, 2001, available at <http://www.dailyemerald.com/2.2409/frohnmayr-it-s-a-very-happy-day-for-us-1.228906>. But, Nike’s brand image suffered in the process.

⁵⁴ *Does I v. Gap, Inc.*, No. CV-01-0031, 2003 WL 22997250, at *1 (D.N. Mar. I. Sept. 11, 2003). The settlement included approximately 23 factories and 30,000 workers. Nikki F. Bas et al., *Saipan Sweatshop Lawsuit Ends with Important Gains for Workers and Lessons for Activists*, CLEAN CLOTHES, Jan. 8, 2004, <http://www.cleanclothes.org/newlist/617-saipan-sweatshop-lawsuit-ends-with-important-ga>. The settlement money was placed into a fund to pay for back wages and create an independent monitoring system to prevent future abuses. Global Exchange, *The Saipan Victory*, <http://www.globalexchange.org/campaigns/sweatshops/saipan>.

⁵⁵ Bas et al., *supra* note 54.

⁵⁶ See William Baue, *Nike and Others Increase Transparency into Their Global Labor Practices*, SOCIAL FUNDS, June 4, 2003, <http://www.socialfunds.com/news/print.cgi?sfArticleId=1139> (FLA report on its first year of monitoring found that the process functioned successfully, but remediation efforts were lacking).

⁵⁷ NIKE, INC., INNOVATE FOR A BETTER WORLD: NIKE FY05–06 CORPORATE RESPONSIBILITY REPORT 17, available at http://www.nikebiz.com/responsibility/documents/Nike_FY05_06_CR_Report_C.pdf.

measurable impact from our collective work . . . to prove large-scale systemic change.”⁵⁸

MNCs have two main options to address code violations, either terminate the contract or engage with the supplier to remedy the situation. Terminating the contract sends a clear message that suppliers must comply with the code of conduct, but also risks hurting the workers who may lose their jobs.⁵⁹ Some labor organizations therefore recommend termination only when suppliers refuse to cooperate, and even then urge companies to seek alternative local suppliers to keep production in the country.⁶⁰ The opposite extreme, a choice to engage with suppliers that consistently violate labor standards in the code of conduct, either exposes MNCs to criticism for sustaining sweatshop conditions or requires the MNC to invest its resources to help the supplier comply. The next two Parts illustrate the potential consequences for MNCs that maintain contractual relations with non-compliant suppliers. Part V advocates engagement.

III. UNENFORCED CODES OF CONDUCT CREATE RISK OF CORPORATE LIABILITY

With control comes liability. Little doubt remains that MNCs have a risk of liability for labor violations by their overseas suppliers. The question is whether courts will hold MNCs accountable.⁶¹ While no court has awarded factory workers damages for enduring sweatshop conditions, one case produced a \$20 million settlement,⁶² and several new claims have yet to be vetted fully by the courts.

A. *Courts Are Receptive to International Sweatshop Litigation in U.S. Courts*

Foreign plaintiffs alleging injuries that occurred outside of the United States face significant pre-trial hurdles to avoid dismissal. This Part discusses jurisdictional issues, choice of law problems, forum non conveniens, prudential doctrines, and interpretations of extraterritoriality that arise in cases by foreign plaintiffs alleging injuries outside of the United States. Part B discusses the willingness of courts to hear those claims.

⁵⁸ *Id.* at 18.

⁵⁹ For example, when Nike decided to stop ordering from two factories in Indonesia, putting an estimated 14,000 people out of work, several thousand workers protested outside the company's Jakarta office with signs saying “Nike is a blood-sucking vampire.” *Nike Protests in Indonesia*, PORTLAND BUS. J., July 16, 2007, available at <http://www.bizjournals.com/portland/stories/2007/07/16/daily4.html>.

⁶⁰ Saha, *supra* note 16.

⁶¹ Aaron J. Schindel & Jeremy Mittman, *Workers Abroad, Trouble at Home: Multinational Employers Face Growing Liability for Labor Violations of Overseas Suppliers*, 19 INT'L L. PRACTICUM 40, 40 (2006).

⁶² See Global Exchange, *supra* note 54.

1. *Jurisdiction*

Foreign plaintiffs can sue in U.S. courts. Federal jurisdiction exists when the court has personal jurisdiction over the defendant and subject matter jurisdiction over the cause of action. Foreign plaintiffs have diversity jurisdiction on the ground of alienage under 28 U.S.C. § 1332(a)(2) if all parties on one side of the controversy are citizens of a state of the United States and all parties on the other side are aliens, regardless of which party is plaintiff or which is defendant.⁶³ Venue gives district courts discretion to transfer a case from one federal district to another.⁶⁴ State jurisdictional requirements are similar to federal requirements but less stringent on personal jurisdiction. Personal jurisdiction exists where the claim arose or where the defendant resides.

2. *Choice of Law*

Some anti-sweatshop claims allege violations of international law. Choice of law issues are distinct from subject matter jurisdiction.⁶⁵ U.S. courts hearing claims involving injuries occurring outside of the United States can choose among three sources of law: the law of the state where the underlying events occurred, the law of the forum state, or international law.⁶⁶ The Supreme Court holds that “[t]o determine the applicable law in a diversity case, a federal court must follow the choice of law rules of the forum state.”⁶⁷ In both federal and state courts, the plaintiff has the burden to demonstrate that U.S. law, rather than the law of a foreign country, should be applied.⁶⁸ International law may be applicable pursuant to a U.S. statute, a treaty ratified by the United States,⁶⁹ or pursuant to *jus cogens*—international laws that bind all nations

⁶³ See 1 FEDERAL PROCEDURE § 1:62, at 119–21 (Janice L. Holben et al. eds., Lawyers ed. 2002).

⁶⁴ E.g., *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 991 (S.D. Ind. 2007) (granting Firestone’s motion to transfer from California to Indiana because Firestone does not have significant connection to activities in complaint, while two corporate defendants based in Indiana have a stronger connection to the case).

⁶⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (“Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness, . . . consequently, it looks to wholly different considerations.” (internal citations omitted)).

⁶⁶ *Doe I v. Unocal Corp.*, 395 F.3d 932, 948 (9th Cir. 2002) (choosing to apply international law because only *jus cogens* violations were alleged).

⁶⁷ *Bledsoe v. Crowley*, 849 F.2d 639, 641 (D.C. Cir. 1988) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). See also *Klaxon Co.*, 313 U.S. at 496 (considering whether New York or Delaware choice of law rules apply).

⁶⁸ See, e.g., *Roe I v. Bridgestone Corp.*, No. 1:06-cv-0627-DFH-JMS, 2008 WL 2732192, at *2 (S.D. Ind. 2008) (Indiana choice of law principles barred application of Indiana law to labor practices in Liberia).

⁶⁹ By this theory, 26 U.S.C. § 1331 may provide jurisdiction in U.S. courts for violations of the ILO Declaration on Fundamental Principles and Rights at Work because the United States is a party. Cf. *Unocal Corp.*, 395 F.3d at 948–49.

regardless of consent.⁷⁰ The application of international law by U.S. courts “goes back at least to the Nuremberg trials.”⁷¹

3. *Forum Non Conveniens*

Under the doctrine of forum non conveniens the court ensures the forum is convenient to the parties with deference to the plaintiff's choice of forum. However, that deference is less when the plaintiff does not reside in the United States.⁷² The court will balance the plaintiff's interest against the burden on the defendant, including the difficulty and expense both of discovery and of securing witnesses when proceedings are far from the locus of the injury.⁷³ Courts may consider, but cannot over-emphasize, whether an alternate forum would produce a worse outcome for the plaintiff.⁷⁴ District courts have broad discretion⁷⁵ and have been willing to reject forum non conveniens motions most often when the foreign plaintiff resides in the United States, and the location

⁷⁰ The Ninth Circuit reasoned in *Unocal* that the Alien Tort Claims Act goes further than federal subject matter jurisdiction under 28 U.S.C. § 1331 and must be read to apply to international law because construing it to apply only to domestic or foreign law “mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort,’ . . . i.e., reducing it to a tort ‘relating to the internal government of a state or nation (as contrasted with *international*).’” *Id.* at 945 n.14, 948–49 (internal citations omitted).

⁷¹ *Id.* at 949.

⁷² *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981) (affirmed dismissal where all real parties in interest resided in Scotland despite the likelihood of a lower damages award because there was no danger plaintiffs would be deprived of any remedy or treated unfairly).

⁷³ *Id.* at 241 n.6 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)); see also *Jose v. M/V Fir Grove*, 801 F.2d 349, 352 (D. Or. 1991) (“Relevant private interest factors include: the relative ease of access to sources of proof, availability of witnesses and ‘all other practical problems that make a trial of a case easy and inexpensive.’ Relevant public interests include the burden on a court and jury with no relation to the litigation; the local interest in having the case decided at home; and the deference to a forum that is at home with the governing law.” (quoting *Gulf Oil Corp.*, 330 U.S. at 508–09)).

⁷⁴ *Piper Aircraft Co.*, 454 U.S. at 254 (“We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a forum non conveniens inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.”). See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99–101, 108 (2d Cir. 2000) (reversing the district court's dismissal on grounds of forum non conveniens because the lower court failed to balance defendant's interests against the public interests to provide a forum for human rights violations); see also Sarah J. Adams Lien, Comment, *Employer Beware? Enforcing Transnational Labor Standards in the United States Under the Alien Tort Claims Act*, 6 J. SMALL & EMERGING BUS. L. 311, 328–29 (2002).

⁷⁵ *Jose*, 801 F.2d at 352 (finding discretion must be “exercised ‘with regard to what is right and equitable under the circumstances and the law and directed by the reason and conscience of the judge as to a just result’” (quoting *Dalla v. Atlas Maritime Co.*, 562 F. Supp. 752, 757 (1983))).

of injury lacks an adequate alternative forum.⁷⁶ The remedy for forum non conveniens is dismissal of the case.

For a foreign sweatshop worker from a country with low labor standards, dismissal from a U.S. court is likely fatal to the case. However, courts may consider whether a corporation that has a code of conduct, routinely monitors compliance, and keeps records of its international supplier operations has relevant evidence readily available in the United States. Moreover, the cost of securing witnesses from outside the United States can be mitigated by telephone or videoconference appearances. Thus, even the lesser degree of deference afforded to foreign plaintiffs, coupled with the court's focus on balancing the parties' burdens of inconvenience, may lend favor to a foreign plaintiff's choice of forum.

4. Prudential Doctrines

Prudential doctrines further limit judicial review of a dispute when the court believes it cannot provide an adequate resolution. Courts considering cases that involve a foreign plaintiff and conduct in a foreign country may deny justiciability on grounds of act of state,⁷⁷ political question,⁷⁸ foreign affairs doctrine,⁷⁹ foreign sovereign immunity,⁸⁰ or

⁷⁶ See discussion in Pagnattaro, *supra* note 4, at 255–57 (discussing *Wiwa*, 226 F.3d at 101, 103–08 and rejecting forum non conveniens motion in deference to choice of Nigerian plaintiff residing in the United States, in light of U.S. interest in providing a forum to litigate international standards of law of human rights, lack of compelling arguments in favor of Great Britain as an alternate forum, and significant hurdles to plaintiff if required to restart litigation in a new jurisdiction); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 335 (S.D.N.Y. 2003) (affirming *Wiwa* and finding Sudan inadequate forum because its government committed genocide and war crimes); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479 (2d Cir. 2002) (following *Wiwa* and concluding Ecuador was the proper forum); see also Alexandra Reeve, Note, *Within Reach: A New Strategy for Regulating American Corporations that Commit Human Rights Abuses Abroad*, 2008 COLUM. BUS. L. REV. 387, 402 (2008) (noting that structural problems and lack of resources in the foreign forum may make its court system inadequate to handle the claim).

⁷⁷ See, e.g., *Doe I v. Unocal*, 395 F.3d 932, 958 (9th Cir. 2002) (“The act of state doctrine is a non-jurisdictional, prudential doctrine based on the notion that ‘the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory’” (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897))). In *Unocal*, the court rejected the defendant's argument that the act of state doctrine was at issue, despite the defendant's assertion that holding Unocal liable for aiding and abetting the Myanmar military to violate human rights necessitated a preliminary finding that the Myanmar military violated international law. *Id.* at 959.

⁷⁸ See, e.g., *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111 (D.D.C. 2005) (declining to hear case on grounds of political question, a doctrine “based upon respect for the pronouncements of coordinate branches of government that are better equipped and properly intended to consider issues of a distinctly political nature”).

⁷⁹ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003) (state laws are preempted when there is a conflict between the state law and the “exercise of the federal executive authority”).

comity.⁸¹ However, these doctrines are most relevant when claims involve action by a foreign government, and therefore are unlikely to arise in anti-sweatshop litigation unless an MNC is accused of aiding and abetting torts of a foreign government. Prudential doctrines are not at issue when the plaintiff alleges a tort committed directly by a U.S. corporation.

5. *Extraterritoriality*

Extraterritoriality is distinct from jurisdiction, choice of law, forum non conveniens, and prudential doctrines because it is a function of statutory interpretation.⁸² However, it presents a burden for foreign plaintiffs to demonstrate that Congress clearly intended a federal law to apply outside of the United States.⁸³ In the context of foreign sweatshops, the Alien Tort Claims Act expressly establishes extraterritorial application,⁸⁴ while the Racketeer Influenced and Corrupt Organizations Act presents greater ambiguity.⁸⁵

B. *Emerging Legal Theories Hold MNCs accountable for Sweatshop Conditions*

In addition to the procedural barriers presented to foreign plaintiffs seeking damages for injuries caused outside of the United States, plaintiffs in anti-sweatshop litigation who reach the courthouse door have the burden to sufficiently state a claim. The earliest claims against MNCs arose under the Alien Tort Claims Act (ATCA),⁸⁶ a long-dormant federal statute adopted in 1789 that provided jurisdiction for Article III courts to hear claims by foreigners for violations of customary international law.⁸⁷ In 2004, the Supreme Court decided *Sosa v. Alvarez-Machain*, considering

⁸⁰ *State of Israel*, 400 F. Supp. 2d at 104 (stating that the Federal Sovereign Immunity Act (FSIA), 28 U.S.C. § 1608(a) (2006), is “the sole method of obtaining subject matter jurisdiction over foreign sovereigns” and provides a “strong presumption of immunity”).

⁸¹ See Reeve, *supra* note 76, at 419 (arguing that foreign states have an interest in regulating the conduct of multinationals within their borders, and importing U.S. substantive standards may interfere with a “deliberate strategy to attract foreign investment from corporations wishing to avoid the stricter regimes of American law”).

⁸² *Jose v. M/V Fir Grove*, 801 F.2d 349, 354 (D. Or. 1991).

⁸³ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“unless . . . ‘the affirmative intention of the Congress [was] clearly expressed,’ we must presume it ‘is primarily concerned with domestic conditions’” (internal citations omitted)).

⁸⁴ See *infra* Part III.B.1.

⁸⁵ See *infra* Part III.B.2.

⁸⁶ 28 U.S.C. § 1350 (2006).

⁸⁷ The Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980), was the first modern interpretation of the ATCA. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000). See also Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 254 & n.4 (2006) (characterizing cases brought under the ATCA as a type of “transnational public law litigation” that relies on “universal jurisdiction” to give domestic courts a role in “articulating and defending global norms for the benefit of the international community,” despite tenuous connections between the conduct and forum).

the scope of ATCA claims for the first time.⁸⁸ While the Court construed the law of nations narrowly, it left open the possibility that evolving standards of universal law could include international labor standards.⁸⁹ The *Sosa* decision spurred several cases testing the newly articulated confines of the ATCA, as well as novel claims against U.S.-based corporations for injuries abroad under other federal and state laws.⁹⁰

Though only one case on record includes a claim alleging injuries to foreign workers arising from a corporate code of conduct,⁹¹ several other cases bring claims that could be used to establish liability against MNCs engaged in the sweatshop trade. This Part analyzes six causes of action with a focus on cases decided since 2004.

I. Alien Tort Claims Act

The ATCA provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁹² To hold a private corporation liable under the ATCA, the plaintiff must demonstrate two elements: (1) the MNC committed a tort, and (2) the tort violated the “law of nations.” Because ATCA cases frequently involve tortious acts that occurred outside of the United States, plaintiffs may be vulnerable to dismissal on grounds of forum non conveniens.⁹³ However, claims involving human rights abuses shift the balance to the plaintiff’s favor.⁹⁴

a. Tort Liability under the ATCA

Courts have made clear that conduct by non-state actors can be actionable under the ATCA.⁹⁵ A private company can be liable for torts

⁸⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004).

⁸⁹ Several sources of international labor law may be actionable under the ATCA, such as the U.N. Charter, the U.N. Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Vienna Declaration, and ILO Conventions. For discussion on these potential sources of international law, see Pagnattaro, *supra* note 4, at 230–36.

⁹⁰ The International Rights Advocates (IRAdvocates), which is the litigation arm of the International Labor Rights Forum, is the leading organization to bring claims against MNCs for their role in causing and perpetuating sweatshop labor in violation of U.S. law with fifteen cases pending in state and federal courts as of January 2010. See International Rights Advocates, Cases, <http://www.iradvocates.org/cases.html>.

⁹¹ See *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *1 (C.D. Cal. Mar. 30, 2007).

⁹² 28 U.S.C. § 1350 (2006). For a summary of ATCA cases alleging human rights abuses by MNCs, see Terry Collingsworth, *Using the Alien Tort Claims Act to Hold Multinationals Accountable for Human Rights Violations in U.S. Federal Courts* 118–25 (ABA Lab. & Employment Law Section Annual Meeting, 2006), <http://www.bna.com/bnabooks/ababna/annual/2006/5.pdf>.

⁹³ Lien, *supra* note 74, at 328.

⁹⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100–01 (2d Cir. 2000).

⁹⁵ See, e.g., *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (no exception for corporations); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1304

that violate international law in three ways: direct action; aiding and abetting; and joint venture, agency, negligence, or recklessness.⁹⁶ Direct liability is the most straight-forward—where the corporation engages in activity of “universal concern,” such as piracy or slave trade.⁹⁷ Aiding and abetting liability occurs when a company is complicit with the unlawful actions of a foreign government, such as a security arrangement to protect the MNCs facilities and operations in a politically unstable country where violence is common.⁹⁸ Joint venture, agency, negligence, or recklessness can arise when a U.S. corporation has the right, obligation, or duty to control the labor policies of another entity.⁹⁹

A corporation that contracts with a supplier it knows to operate a sweatshop may be aiding and abetting unlawful conduct. In *Doe I v. Unocal Corp.*, the district court found that Unocal aided and abetted the unlawful conduct of Myanmar security forces by hiring them to provide security and build infrastructure along the pipeline in exchange for money or food and by meeting daily with the military to direct placement of security guards, despite Unocal’s knowledge that the use of forced labor to provide the services was likely.¹⁰⁰ Courts may view as parallel a situation in which an MNC enters a contractual relationship with a supplier to provide labor and produce goods in exchange for money, involving routine oversight by the MNC, with knowledge that the suppliers are likely to violate the MNCs code of conduct and customary law. The same relationship may arise through joint venture or agency, negligence, or recklessness, depending on the degree of control and oversight that exists between the MNC and the supplier.

(C.D. Cal. 2000) (discussing the evolution of precedent on whether non-state action is actionable under the ATCA); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794 (D.C. Cir. 1984) (non-state conduct of piracy and slave trading is actionable under ATCA); *Kadic v. Karadžić*, 70 F.3d 232, 239, 243 (2d Cir. 1995) (holding that some forms of conduct violate law of nations whether by state or non-state actors, including piracy, slave trading, and certain war crimes, but torture and summary execution are actionable only if by state actors); *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002) (crimes like “rape, torture, and summary execution” by non-state actors are actionable under ATCA “to the extent that they were committed . . . in pursuit of genocide or war crimes” (emphasis and internal citations omitted)).

⁹⁶ Pagnattaro, *supra* note 4, at 226–30.

⁹⁷ *Id.* at 227–28.

⁹⁸ See, e.g., *Unocal Corp.*, 395 F.3d at 950 (company can be liable for aiding and abetting security forces to commit forced labor, murder, rape, and torture through knowing “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004) (Nigerian citizens alleged that Chevron aided and abetted the Nigerian military and police in committing human rights abuses against Nigerians for protesting against Chevron’s environmental practices). See also Joseph Z. Fleming, *Statutes Not Covered in Other Sections of This Chapter That Have Extraterritorial Effect*, in 1 INTERNATIONAL LABOR & EMPLOYMENT LAWS 50-6, 50-15 (William L. Keller et al. eds., 2d ed. 2003).

⁹⁹ Pagnattaro, *supra* note 4, at 220 (citing *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1352–55 (S.D. Fla. 2003)).

¹⁰⁰ 395 F.3d at 947, 952–53.

b. *Defining the Law of Nations*

Sosa v. Alvarez-Machain addressed the question of what constitutes the law of nations under the ATCA. In *Sosa*, the Supreme Court held that U.S. courts have jurisdiction over private rights of action alleging a limited range of international norms.¹⁰¹ It cautioned courts to weigh heavily the impact of their decisions on foreign policy.¹⁰² However, the Court rejected the Bush Administration's view that ATCA lawsuits necessarily interfere with foreign policy and open MNCs to frivolous or irrelevant grievances.¹⁰³ The Court advocated judicial restraint from creating new causes of action and thus construed the "law of nations" narrowly¹⁰⁴ to include only norms as "specific, universal, and obligatory" as those recognized in 1789 when the ATCA was enacted: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."¹⁰⁵ On the facts of *Sosa*, the plaintiff's allegation that he was kidnapped by a U.S. DEA agent and Mexican nationals did not meet this standard and therefore failed to state a claim under the ATCA.¹⁰⁶

Since *Sosa*, the circuits have overwhelmingly rejected ATCA claims based on allegations of mere sweatshop conditions.¹⁰⁷ The only labor cases to survive motions to dismiss for failure to state a claim included allegations of egregious conduct, such as torture or murder of trade

¹⁰¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–13, 725, 732–33 (2004) ("Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

¹⁰² *Id.* at 727, 732–33 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." (footnote call numbers omitted)).

¹⁰³ *Id.* at 727.

¹⁰⁴ *Id.* at 725 ("[C]ourts should require any claim based on the present-day law of nations to rest on a *norm of international character accepted by the civilized world* and defined with a *specificity* comparable to the features of the 18th-century paradigms we have recognized." (emphasis added)).

¹⁰⁵ *Id.* at 724, 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

¹⁰⁶ *Id.* at 712–13.

¹⁰⁷ *See, e.g.,* *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 WL 5975664 (C.D. Cal. Mar. 30, 2007) (poor working conditions, including excessive hours or days of work, withheld pay, less than minimum-wage pay, overtime without pay, less than required rest periods, lack of safety equipment, denial of maternity benefits, discrimination because of union activities, and physical abuse do not constitute violations of customary law); *Does I v. Gap Inc.*, No. CV-01-0031, 2002 WL 1000068 (D.N. Mar. I. May 10, 2002) (rejecting characterization of factory work in Saipan as involuntary servitude without facts showing workers' free will was overcome by defendants); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (allegations that, during collective bargaining negotiations, Del Monte contracted a private security force that held seven Guatemalan union leaders hostage, threatened them with death, and forced them at gunpoint to denounce the union insufficient to support ATCA claim).

union leaders,¹⁰⁸ slave labor,¹⁰⁹ or rape, torture, and murder by paramilitary forces under orders of a company.¹¹⁰ Given this precedent, plaintiffs may have difficulty establishing that specific and universal standards exist for minimum wages or occupational health and safety.

However, the Court left open the possibility that it will recognize new norms of customary law as measured by a two-pronged standard: (1) specificity and (2) universal acceptance.¹¹¹ The Court has not defined those terms expressly, and it remains to be seen whether the four core labor rights established under the 1998 ILO Declaration on Fundamental Principles and Rights at Work meet the *Sosa* standards of universal acceptance and sufficient specificity.¹¹² Lower courts have permitted claims alleging violations of international law on other ILO conventions.¹¹³ Moreover, in *Sosa*, the Supreme Court invited guidance from Congress on identifying international norms under the ATCA.¹¹⁴

¹⁰⁸ *E.g.*, *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (alleging paramilitaries murdered union mineworkers under orders from Drummond); *Villeda Aldama*, 2007 WL 3054986, at *1 (alleging detention and torture of seven union leaders of a Guatemalan plantation by Del Monte and subsidiaries); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) (alleging Coca-Cola aided and abetted in murder of leaders in Colombian Soft-Drink Workers Union).

¹⁰⁹ *Doe I v. Unocal Corp.*, 395 F.3d 932, 946–47 (9th Cir. 2002) (alleging joint venture with Burmese security forces to oversee the development of a natural gas pipeline through rural Burmese communities by slave labor for the company's benefit; forced labor is included in the Thirteenth Amendment's definition of slavery).

¹¹⁰ *Doe I v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16 (D.D.C. 2008) (allegations of injuries caused by Indonesian military hired by ExxonMobil to protect its natural gas facilities); *In re Chiquita Brands Int'l, Inc.*, 536 F. Supp. 2d 1371 (J.P.M.L. 2008) (order consolidating cases alleging Chiquita was complicit with paramilitary network to intimidate, threaten, abduct, torture, and murder workers to force them to quit union, refrain from filing grievances, and accept poor working conditions); *Unocal Corp.*, 395 F.3d at 953–54 (allegations of murder, rape, and torture by a non-state actor were actionable because they occurred in furtherance of forced labor).

¹¹¹ *Sosa*, 542 U.S. at 729–30, 732 (“[T]he door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms.”).

¹¹² According to the ILO, “[t]he Declaration commits all ILO member States to respect the principles in four areas, whether or not they have ratified the specific Conventions.” ILO, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work, <http://www.ilo.org/declaration/thedeclaration/history/lang-en/index.htm>. The four core labor standards are: (1) freedom of association and collective bargaining; (2) elimination of forced and compulsory labor; (3) elimination of discrimination in respect of employment and occupation; and (4) abolition of child labor. See ASIAN DEV. BANK & ILO, CORE LABOR STANDARDS HANDBOOK 12 (2006), available at <http://www.adb.org/Documents/Handbooks/Core-Labor-Standards/CLS-Handbook.pdf>.

¹¹³ See, e.g., *Doe I v. Unocal Corp.*, 110 F. Supp. 1294, 1308 (C.D. Cal. 2000) (California district court relied on ILO Convention 29 prohibiting the use of forced labor); see also *Unocal*, 395 F.3d at 945 (Court of Appeals for the Ninth Circuit relied on the UN Declaration of Human Rights to establish an international law banning

In 2005, a year after the *Sosa* decision, Senator Diane Feinstein introduced a bill to amend the ATCA and clarify the jurisdiction of federal courts.¹¹⁵ She expressed concern that the Court left uncertain which claims ought to go forward, leaving judges “to reach markedly different conclusions under the law, based on arbitrary interpretations of case-specific facts and other considerations.”¹¹⁶ Feinstein said she sought to ease MNCs’ concerns about an estimated \$200 billion in collective damages claimed under alien tort suits and to encourage them to invest abroad “1. by specifying a universe of the most egregious human rights violations that they may be held liable for and 2. offering a clear, understandable legal standard that judges their actions accordingly.”¹¹⁷

If adopted, Feinstein’s amendment would have restricted the availability of ATCA claims substantially by enumerating the specific injuries covered by the act, requiring an intent to commit the tort, adding an exhaustion requirement, establishing limitations on discovery, prohibiting most anonymous complaints, prohibiting contingency fee arrangements, creating a ten-year statute of limitations, and giving the President authority to block jurisdiction if the trial could negatively impact U.S. foreign policy interests.¹¹⁸ She asserted that her proposal would provide a fair compromise between the interests of U.S. companies and human rights organizations by deterring “legal fishing expeditions” by plaintiffs whose “real intent . . . is to rely on an extensive legal discovery process to uncover matters that embarrass companies and delay

forced labor). Courts have not yet addressed whether ILO core labor standards on child labor and discrimination constitute the law of nations under the ATCA. For an analysis on gender discrimination in supplier factories, see TASK FORCE ON GENDER AND TRADE, UN INTER-AGENCY NETWORK ON WOMEN AND GENDER EQUALITY, TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES xi–xii, 4 (Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti eds., 2004), http://www.unctad.org/en/docs/edm20042_en.pdf.

¹¹⁴ *Sosa*, 542 U.S. at 731 (“[Although] we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”).

¹¹⁵ 151 CONG. REC. S11,433 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein); Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=fs1874is.txt.pdf.

¹¹⁶ 151 CONG. REC. S11,434.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at S11,433. *See also id.* at S11,435 (“The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign state is responsible for committing the tort in question within its sovereign territory.”).

their business plans.”¹¹⁹ However, the bill died a week after its introduction at Senator Feinstein’s request in light of concerns raised by human rights advocates.¹²⁰

MNCs would be wise to consider their exposure to ATCA claims because as one scholar notes, “this law has the potential to change [the] face of the global workplace.”¹²¹ This prediction may prove correct in three ways. First, MNCs face uncertainty about whether courts will enforce international labor standards, and if so, what conduct violates those standards. Second, Congress is receptive to amending the ATCA and may favor the interests of plaintiffs over businesses. Third, even if plaintiffs fail to state a claim under the ATCA, allegations of corporate wrongdoing attract media attention and result in damaging negative publicity.¹²² Ultimately, ATCA claims could result in minimum international labor standards whether recognized in common law or imposed by consumer demand. Codes of conduct with lesser standards risk obsolescence.

2. *Racketeer Influenced and Corrupt Organizations Act (RICO)*

A RICO claim alleges unlawful conduct by an enterprise through a pattern of racketeering activity as defined in 18 U.S.C. § 1961.¹²³ The statute provides a private cause of action for civil remedies, including treble damages and the cost of the suit, plus reasonable attorney fees.¹²⁴ A contractual relationship between a retailer and supplier can provide

¹¹⁹ *Id.* at S11,434–35.

¹²⁰ Letter from Dianne Feinstein, U.S. Senator, to Arlen Specter, U.S. Senator and Chairman of the Committee on the Judiciary (Oct. 25, 2005), available at <http://www.humanrightsfirst.info/pdf/05113-ij-atca-feinsteinto-specter.pdf>; The Library of Congress THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01874:@@X> (showing last action on S. 1874 was reading of the bill twice and referral to the Committee on the Judiciary on Oct. 17, 2005 during the 109th Congress).

¹²¹ Pagnattaro, *supra* note 4, at 211, 261. See also Lien, *supra* note 74, at 348 (“U.S. employers need, at the very least, to foster heightened sensitivity to possible claims under the ATCA by non-U.S. nationals alleging violations of certain international labor rights . . .”).

¹²² See Fleming, *supra* note 98, at 50-18. The risk of bad public relations is a recurring theme for all anti-sweatshop litigation.

¹²³ 18 U.S.C. § 1961(5) (2006); 18 U.S.C. § 1962(c) (2006) (prohibiting “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity”).

¹²⁴ 18 U.S.C. § 1964(c) (2006). A RICO claim for civil damages can be brought with a Federal Corrupt Practices Act claim. U.S. Dept. of Justice, *Layperson’s Guide to Foreign Corrupt Practices Act (FCPA)*, <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> (“Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.”).

sufficient facts to state a RICO claim,¹²⁵ and some courts will apply RICO claims extraterritorially if plaintiffs can demonstrate that the unlawful conduct meets one of two legal tests.¹²⁶ Courts have not yet considered a case with foreign plaintiffs alleging a RICO violation arising from a sweatshop outside of the United States.¹²⁷

a. Stating a Claim Under RICO

A RICO claim includes five elements:

(1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity.¹²⁸

Racketeering is defined by the statute to include “a wide variety of activities ranging from murder and extortion to interstate fraud and any activity directed at the obstruction of justice.”¹²⁹

Only one federal opinion addresses the merits of a RICO claim by factory workers against corporate defendants for policies and practices that perpetuate sweatshop conditions.¹³⁰ In *Does I v. Gap, Inc.*, the district court held that plaintiffs sufficiently pleaded a RICO claim by alleging that the retailers used their collective “power through contracts, oversight, and economic pressure” to require garment manufacturers to continue unlawful policies and practices that perpetuated sweatshop

¹²⁵ *Does I v. Gap, Inc.*, No. CV-01-0031, 2002 WL 1000068, at *3–4 (D.N. Mar. I. May 10, 2002). The court rejected the defendants’ motion to dismiss for failure to state a claim, finding sufficient allegations that the contractual relationships between twenty-seven retailers and thirty suppliers in Saipan were part of an enterprise for purposes of racketeering. *Id.* Allegations of forced labor can also form the underpinnings of an extortion claim under RICO. *Doe I v. Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002).

¹²⁶ The circuits are split on whether RICO can apply extraterritorially, but those that conclude statutory interpretation supports extraterritorial application under some circumstances apply the conduct and effects tests, described *infra*, Part III.B.2.b. *See, e.g., Unocal*, 395 F.3d 932 at 961–62 (denying extraterritorial application of RICO because plaintiffs failed to meet either test); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359–60 (S.D. Fla. 2003) (rejecting extraterritorial application for failure to assert alleged conduct fulfilled under either test); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003) (rejecting extraterritorial application because facts were insufficient to allege substantial effect in U.S.).

¹²⁷ *But see Gap Inc.*, 2002 WL 1000068, at *1 (addressing similar conduct in the U.S. Commonwealth of the Northern Mariana Islands (CMNI)).

¹²⁸ *Villeda Aldana*, 305 F. Supp. 2d at 1306 (citing *BankAtlantic v. Coast to Coast Contractors, Inc.*, 22 F. Supp. 2d 1354, 1358 (S.D. Fla. 1998)).

¹²⁹ *Jose v. M/V Fir Grove*, 801 F.2d 349, 355 (D. Or. 1991).

¹³⁰ *Gap Inc.*, 2002 WL 1000068, at *3. *See Villeda Aldana*, 305 F. Supp. 2d at 1288–89, 1306 (dismissing a RICO claim which alleged Del Monte contracted with a private security force that injured Guatemalan union leaders for insufficiently pleading the elements).

conditions in the factories.¹³¹ The codes of conduct and monitoring programs figured prominently into the plaintiffs' complaint, including allegations of intent to conspire in unlawful conduct¹³² by aiding and abetting, agency or joint venture relationship¹³³ in a pattern of racketeering activity.¹³⁴

Gap, Inc. provides support for RICO claims alleging an enterprise between MNCs and their international suppliers. As in *Gap, Inc.*, a foreign plaintiff could allege that codes of conduct establish contractual control over the operative details of the production process, and that monitoring programs establish a basis to prove that MNCs are aware when sweatshop conditions persist. The reasoning follows that despite the power of MNCs to enforce their codes of conduct, they directly cause, or aid and abet, suppliers to continue sweatshop conditions by paying an unreasonably low contract price, requiring unreasonably short manufacturing deadlines, and demanding last-minute order changes. MNCs profit from sweatshop conditions and cause investment injuries by using those profits to perpetuate the arrangement with codes of conduct and monitoring systems that discourage involvement by stakeholders to improve labor conditions. Similar facts were raised in *Jane Doe I v. Wal-Mart Stores, Inc.*,¹³⁵ but the plaintiffs did not raise a RICO claim.

MNCs facing RICO claims arising from international sweatshops may persuade courts that these allegations are insufficient to satisfy the elements of a RICO claim. First, the existence of a monitoring program that publicly and accurately reports on compliance with the company's code of conduct counters allegations that the MNC misled stakeholders or obstructed alternative remedies. Second, MNCs can rebut allegations

¹³¹ *Gap Inc.*, 2002 WL 1000068, at *3, *7 (including retailers' common use of contracts, supervisory personnel, codes of conduct, and monitoring protocols).

¹³² *Id.* at *11 (alleging common effort to develop a code of conduct and monitoring program that would not be meaningfully enforced, with awareness or reckless disregard of the resulting "system of forced labor, involuntary servitude and unlawful sweatshop conditions").

¹³³ *Id.* at *10, *16, *18 & n.40 (alleging that formulating and devising codes of conduct and monitoring programs was a joint exercise of "meaningful control over the employment policies and working . . . conditions [of workers]," and retailers' participation in the day-to-day operations and control over the affairs of the alleged enterprises went "beyond mere acquiescence to conditions and [was] more than just applying economic pressure").

¹³⁴ *Id.* at *12-13 (alleging retailers used proceeds from the alleged scheme for promotional campaigns, monitoring operations, workplace and barracks inspections, legal fees, and meetings to "jointly and deliberately block[] the development and implementation of workplace monitoring programs that would effectively identify and require prompt and appropriate remediation of the unlawful conditions of employment and the unlawful workplace and living quarter conditions").

¹³⁵ No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *1-2 (C.D. Cal. Mar. 30, 2007) (alleging that Wal-Mart knows its labor laws are not routinely enforced in many of the foreign countries in which its suppliers have factories, that Wal-Mart's efforts to ensure its suppliers comply with its code of conduct are inadequate, and that Wal-Mart imposes difficult price and time requirements on suppliers that force suppliers to violate the code).

that they created codes of conduct to perpetuate sweatshops by arguing that the more reasonable explanation is that they intended to establish minimum labor standards. Third, MNCs can challenge naked allegations that demanding last-minute order changes make compliance with the code of conduct impossible. However reasonable these defenses to a RICO claim may be, plaintiffs have at least as persuasive a precedent in *Gap, Inc.* that the allegations are sufficient to avoid dismissal for failure to state a claim.

b. Extraterritorial Application of RICO

MNCs have a stronger position to argue that RICO does not have extraterritorial application because the circuits are split on the issue.¹³⁶ Courts that find a statutory basis to apply RICO extraterritorially consider whether the alleged conduct meets the conduct test or effects test.¹³⁷ Under the conduct test, the court has subject matter jurisdiction “where conduct within the United States directly caused the loss,” but not for “[m]ere preparatory activities, and conduct far removed from the consummation of the fraud.”¹³⁸ Under the effects test, “the court has jurisdiction whenever a predominantly foreign transaction has substantial effects within the United States.”¹³⁹ The Ninth Circuit Court of Appeals has characterized these tests as two sides of the same coin, where the conduct test considers domestic conduct directly causing foreign loss or injury, and the effects test considers foreign conduct directly causing domestic loss or injury.¹⁴⁰

¹³⁶ See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002) (allowing extraterritorial application); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 115 (D.D.C. 2005) (concluding Congress intended to apply RICO extraterritorially to activities like organized crime that have substantial, deleterious effects on the United States, such as drug-trafficking, but not necessarily to activities like labor violations); *Jose v. M/V Fir Grove*, 801 F.2d 349, 354–55, 357 (D. Or. 1991) (concluding that presumption against extraterritorial application of federal statutes has not been overcome by clearly expressed congressional intent within the RICO statutes or legislative history; rejecting extraterritorial application to fraudulent treatment of foreign seamen by a foreign corporation); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) (concluding that a district court has jurisdiction where the plaintiff can demonstrate that the alleged foreign conduct meets the “conduct” or “effects” tests).

¹³⁷ See, e.g., *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310–11 (C.D. Cal. 2000) (applying the conduct and effects tests in international securities transactions and antitrust matters because RICO is silent regarding its extraterritorial application).

¹³⁸ *Id.* at 1311 (finding Unocal’s communication concerning its participation in the project, finance meetings, and transfer of money to be mere preparatory activities). See also *Unocal Corp.*, 395 F.3d at 961.

¹³⁹ *Unocal Corp.*, 110 F. Supp. 2d at 1311; see also *Unocal Corp.*, 395 F.3d at 961.

¹⁴⁰ *Unocal Corp.*, 395 F.3d at 961; see also *Sinaltrainal*, 256 F. Supp. 2d at 1359 (recognizing extraterritorial application under the conduct test, where “conduct within the United States directly cause[s] [a] foreign injury,” and the effects test, where “a foreign conduct at issue has ‘substantial’ effects within the United States” (quoting *Consol. Gold Fields PLC v. Minorco*, 871 F.2d 252, 261 (2d Cir. 1989))).

Three cases with RICO claims involving conduct by U.S.-based MNCs conducting business outside of the United States illustrate the high bar for extraterritorial applications of RICO. Two of those cases were heard by the same district court. In *Sinaltrainal v. Coca-Cola*, the Eleventh Circuit denied extraterritorial application of RICO to Coca-Cola's conduct in Columbia related to the murder of a trade union leader by paramilitary forces because the plaintiff failed to assert that the alleged foreign conduct fulfilled either test.¹⁴¹

In *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, the court dismissed allegations concerning Del Monte's participation in an enterprise with a private security force in Guatemala that kidnapped and tortured seven union leaders for failure to satisfy either test for extraterritorial application.¹⁴² Finding the facts analogous to *Sinaltrainal*, the court said Del Monte's conduct "essentially concern[ed] preparatory activities for foreign conduct that do not have a substantial effect within the United States."¹⁴³ The court reasoned that "even if the scheme was hatched in the United States, as Plaintiffs allege, the connection to Defendants' profits is tenuous at best."¹⁴⁴

The Ninth Circuit Court of Appeals reached the same conclusion in *Doe I v. Unocal Corp.*, rejecting the plaintiff's argument that transferring significant financial and technical support for project activity from the United States to Myanmar for security services from the Myanmar military met the conduct test, because that conduct did not directly cause loss or injury in Myanmar.¹⁴⁵

To prevail in a RICO claim concerning a sweatshop outside of the United States, a plaintiff must demonstrate that MNC conduct in the United States caused the injury at the foreign factory or that the effect of MNC conduct at a foreign sweatshop caused injury in the United States. The courts have not identified a clear threshold between conduct that is merely preparatory and conduct that satisfies the test. Likewise, the type or degree of an effect in the United States required to meet the effects test is ambiguous. While finance meetings and the transfer of funds to secure a U.S. pipeline project may be insufficient, ongoing business operations—in which decisions concerning contractual relations with suppliers take place in the United States—may satisfy the conduct test. Alternatively, the impact of a company's conduct to implement a code of

¹⁴¹ 256 F. Supp. 2d at 1348, 1359–60. In 2006, the court denied reconsideration of that order. *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1277 (S.D. Fla. 2006).

¹⁴² *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1288–89, 1306 (S.D. Fla. 2003).

¹⁴³ *Id.* at 1306.

¹⁴⁴ *Id.*

¹⁴⁵ *Unocal Corp.*, 395 F.3d at 961. In 2003, the Ninth Circuit Court of Appeals reheard the case en banc, and in 2005 the court granted the parties' stipulated motion to dismiss with prejudice and vacated the district court opinion. *See John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

conduct for its international supplier on consumer decisions in the United States may be sufficient to satisfy the effects test.

3. State Laws on False Advertising and Unfair Competition

The strategy to sue MNCs under state laws on false advertising and unfair competition avoids jurisdictional issues when U.S. plaintiffs bring claims concerning conduct in the United States. The injury alleged is not to a foreign factory worker who suffers from the harms of sweatshop labor. Rather, the injury is to the consumer who is deceived by MNCs that induce customer loyalty by proclaiming a commitment to manufacture sweat-free goods, either expressly or impliedly by their codes of conduct, monitoring programs, and related initiatives. The plaintiff argues that a corporation violates state false advertising and unfair competition laws when it misleads the public to believe it does not do business with sweatshops.¹⁴⁶

The theory behind a false advertising and unfair competition claim is that consumers rely to their detriment on the misleading information to form an opinion and make purchasing decisions. The leading case is *Nike, Inc. v. Kasky*, where the plaintiff successfully alleged a violation of California state law, and the case ultimately resulted in a settlement.¹⁴⁷ *Kasky* raised several legal questions, such as when codes of conduct will be considered a marketing tool and subject to false advertising laws, whether the First Amendment protects this form of corporate speech, who has standing to sue under state laws, and whether the limited remedy of an injunction against further dissemination of the misleading speech can further the objective to eliminate sweatshops.

a. Nike, Inc. v. Kasky

Kasky, a labor activist, filed a claim in California state court in 1998 alleging that Nike violated the state's unfair competition and false advertising statutes by responding to anti-sweatshop critics with false and misleading statements about improvements in labor conditions at its supplier factories.¹⁴⁸ Nike prevailed at the trial level on a First Amendment defense, which the California Court of Appeals affirmed. However, the California Supreme Court reversed and remanded, finding that Nike's speech could be regulated as commercial speech.¹⁴⁹ The U.S. Supreme Court granted certiorari but later dismissed the review as improvidently granted, in part for lack of standing, with six justices filing concurring and dissenting opinions.¹⁵⁰ The case settled before it could return to the lower court on remand for consideration of whether Nike's speech was misleading or in violation of the California statute. Nike

¹⁴⁶ For a discussion about the parallel federal law, the Federal Trade Commission Act, see *infra*, Part IV.B.1.

¹⁴⁷ *Nike, Inc. v. Kasky*, 539 U.S. 654, 656–58 (2003) (Stevens, J., concurring) (per curiam opinion dismissing previously granted certiorari).

¹⁴⁸ *Id.*; *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

¹⁴⁹ *Kasky*, 45 P.3d at 260–61.

¹⁵⁰ *Nike, Inc.*, 539 U.S. at 655–56, 665.

agreed to pay \$1.5 million to the Fair Labor Association (of which it was a member).¹⁵¹

b. Post-Kasky

In the aftermath of *Kasky*, concerns that the decision would chill MNC transparency regarding factory labor conditions did not materialize. Even Nike subsequently expanded its transparency by releasing a list in 2005 containing the names of all its 705 contract factories in 51 countries, noting that the potential benefits to the industry and factory workers outweighed the possible competitive risks.¹⁵² Likewise, in 2007, The Gap announced plans to release a sweat-free label, thereby calling attention to labor conditions in its supply factories.¹⁵³ A Wal-Mart corporate crisis consultant explained that, because consumers are more prone to believe criticism of a company now, whether true or not, corporations “recognize the need to control the message” when they see that conventional public relations has failed.¹⁵⁴ In sum, these companies have an incentive to expose their manufacturing processes to the public eye because the risk of damage to branded reputation is greater than the risks of exposing poor labor conditions.

The significance of *Kasky* for MNCs is uncertain. In California, a 2004 ballot initiative cut off *Kasky*-like claims by increasing the standing requirements for private plaintiffs.¹⁵⁵ On the other hand, the California Supreme Court recognizes that its law of unfair competition is designed “to ‘extend[] to the entire consuming public the protection once afforded only to business competitors.’”¹⁵⁶ Requirements vary by state, but even if forthcoming plaintiffs prevail on a false advertising claim, the remedy to enjoin misleading representations of labor practices does not reach the labor practices themselves.

In 2007, a California district court rejected a novel application of the state’s false advertising and unfair competition law in *Jane Doe I v. Wal-*

¹⁵¹ Press Release, Fair Lab. Ass’n, Fair Labor Association Receives \$1.5 Million Settlement of *Kasky v. Nike* First Amendment Case (Sept. 12, 2003), http://dev.fairlabor.org/docs/Nike_Kasky.doc; Press Release, Nike, Inc., Fair Labor Association Accredits Nike Compliance (May 12, 2005), http://www.nikebiz.com/media/pr/2005/05/12_Compliance.html.

¹⁵² Roner, *supra* note 48; Jung, *supra* note 48, at A1.

¹⁵³ Dan McDougall, *Gap Plans “Sweatshop Free” Labels*, THE OBSERVER, Nov. 4, 2007, <http://www.guardian.co.uk/business/2007/nov/04/3>.

¹⁵⁴ Nat Ives, *Wal-Mart and Eli Lilly Turn to Full-Page Ads to Address Their Critics*, N.Y. TIMES, Jan. 14, 2005, at C5.

¹⁵⁵ See CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: PROPOSITION 64 (2004), available at <http://vote2004.sos.ca.gov/voterguide/propositions/prop64-title.htm> (requiring that plaintiffs suffered injury-in-fact and lost money or property as a result of unfair competition).

¹⁵⁶ Sharon J. Arkin, *The Unfair Competition Law after Proposition 64: Changing the Consumer Protection Landscape*, 32 W. ST. U. L. REV. 155, 157 (2005) (quoting Bank of the W. v. Superior Court, 833 P.2d 545, 551 (Cal. 1992)).

*Mart Stores, Inc.*¹⁵⁷ Californian plaintiffs alleged Wal-Mart's use of sweatshop labor created an unfair competitive disadvantage for their employers, who consequently reduced the plaintiffs' compensation.¹⁵⁸ The district court held that the allegation was too attenuated, because plaintiffs did not allege they lost money as result of false or deceptive advertising and they did not claim to be consumers of Wal-Mart products.¹⁵⁹ In addition, the court noted that the plaintiffs failed to provide any legal authority to extend a consumer protection law to an alleged loss resulting from independent actions by their employers on grounds that their employers were influenced by Wal-Mart's actions.¹⁶⁰

Despite the verdict in *Wal-Mart*, the viability of a false advertising or unfair competition claim as an anti-sweatshop strategy has not been exhausted. In *Kasky*, the California Supreme Court was persuaded that a company's promotion of its commitment to fair labor practices is commercial speech subject to restrictions.¹⁶¹ The *Wal-Mart Stores, Inc.* decision does not preclude a competitor to the MNC from bringing a similar claim on its own behalf. Moreover, any negative publicity that accompanies lawsuits raising this claim may add value to the limited remedy. Finally, as suggested earlier, a false advertising or unfair competition claim may complement a RICO claim by providing a predicate unlawful action that has the requisite effect in the United States to state a claim. A similarly complementary relationship may exist for tort, contract, and unjust enrichment claims, as will be discussed later in this Part.¹⁶²

4. Common Law Torts

Foreign plaintiffs can bring common law tort claims against U.S.-based MNCs under state law.¹⁶³ Negligence claims have been the most

¹⁵⁷ *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *6 (C.D. Cal. Mar. 30, 2007).

¹⁵⁸ Although *Wal-Mart Stores, Inc.* did not include a false advertising claim, it echoed the issues raised in *Kasky*: "By publicly trumpeting its ethical sourcing policies, Wal-Mart [affirmed] that it could achieve compliance, but as long as the public believes it has complied, Wal-Mart continues to profit from systematic legal violations at the expense of Plaintiffs herein and other workers at the supplier factories." Appellants' Opening Brief at 9, *Jane Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (No. 07-55560).

¹⁵⁹ *Wal-Mart Stores, Inc.*, 2007 WL 5975664, at *5-6.

¹⁶⁰ Appellants' Opening Brief, *supra* note 158, at 9-10. The California plaintiffs did not appeal the decision on this claim.

¹⁶¹ Many commentators were disappointed when the U.S. Supreme Court reversed its grant of certiorari because it left unresolved the issue of when corporate speech is noncommercial and merits First Amendment protection. *See, e.g.*, Rosch, *supra* note 27, at 5-6; Piety, *supra* note 15, at 368.

¹⁶² For additional discussion on the utility of *Kasky*-style lawsuits, see Julia Fisher, *Free Speech to Have Sweatshops? How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions*, 26 B.C. THIRD WORLD L.J. 267, 301-09 (2006).

¹⁶³ *See* Reeve, *supra* note 76, at 400 (arguing that state common law claims may reach a far broader scope of conduct by corporate defendants that commit human rights violations abroad than the ATCA).

successful, but other tort violations are also possible. A common law tort claim has four elements: (1) duty of care; (2) breach of duty; (3) causation/proximate cause; and (4) injury. A full range of remedies is available, including compensatory and punitive damages, as well as injunctive relief.

A foreign worker seeking relief for an injury that occurred outside the United States first must demonstrate that a U.S. court is the appropriate forum for the lawsuit and that the law of the forum should apply.¹⁶⁴ If the court agrees to hear the case, then the plaintiff next must satisfy the burden to show that the MNC had a duty of care under the circumstances. Every state determines whether a duty of care exists under its own law, but most apply a multi-factor balancing text, including public policy considerations.¹⁶⁵ Some states give priority to whether the injury was foreseeable by the defendant.¹⁶⁶

In sweatshop litigation, plaintiffs have yet to establish that a duty to workers arises from the relationship between a corporation and its suppliers. But a duty of care may be established in three ways: (1) by the text of the code of conduct, (2) by substantial control of the company over supplier operations, or (3) by public statements of the company expressing or implying a duty to the workers.

¹⁶⁴ For example, in *Unocal*, a case alleging injury to workers in Myanmar by the company's security forces, the federal district court dismissed all federal claims and then declined to exercise supplemental jurisdiction over the plaintiff's state law claims. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1311–12 (C.D. Cal. 2000). The plaintiffs refiled their common law tort claims in a California state court, eventually resulting in a settlement. Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135, 135 (2005). In *Romero v. Drummond Co.*, involving allegations that the company ordered paramilitary forces to murder union workers, the Eleventh Circuit Court of Appeals affirmed the district court's summary judgment for defendant on all state common law tort claims, concluding that Alabama law does not apply to injuries which occurred outside the state under the rule of *lex loci delicti* (the law of the place where the tort was committed). 552 F.3d 1303, 1318 (11th Cir. 2008). Similarly, in *Roe I v. Bridgestone Corp.*, in which plaintiffs alleged the company used child labor, the court applied Indiana choice of law principles following the *lex loci delicti* rule and barred application of Indiana law to labor practices in Liberia. No. 1:06-cv-0627-DFH-JMS, 2008 WL 2732192, at *2 (S.D. Ind. 2008). The court declined to follow the "governmental interests" test for choice of law that was applied in *Doe I v. Exxon Mobil Corp.*, No. Civ.A.01-1357(LFO), 2006 WL 516744, at *1–2 (D.D.C. Mar. 2, 2006), which led that court to apply District of Columbia law to events in Indonesia. *Bridgestone Corp.*, 2008 WL 2732192, at *2.

¹⁶⁵ See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 827–30 (Cal. 1989) (establishing a multi-factor test to determine whether a duty of care exists); see also Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1523–25 (1997) (surveying analysis of duty in states).

¹⁶⁶ Lake, *supra* note 165, at 1529, 1531, 1549, 1550, 1552 (noting the weight of foreseeability as a factor by courts in Alabama, Arizona, Montana, Nebraska, and New Jersey).

In *Wal-Mart Stores, Inc.*, the Ninth Circuit Court of Appeals focused on the first two approaches when it affirmed the district court's dismissal of the complaint for failure to state a claim.¹⁶⁷ The court held that the company's code of conduct did not create a duty to monitor the suppliers or to prevent intentional mistreatment of them; it merely reserved the right to inspect the factories.¹⁶⁸ The court also held that the company had no duty to the workers under a theory of *respondeat superior*, because the plaintiffs failed to allege with specificity that Wal-Mart exercised control over their day-to-day employment.¹⁶⁹ When Wal-Mart exercised that right to monitor suppliers, the court concluded that its intent was to ensure that suppliers were meeting contractual obligations, and not to direct the daily work activity of the suppliers' employees.¹⁷⁰ The district court pointed out that the plaintiffs' joint employer reasoning was overbroad, because it would hold all businesses responsible for the employment conditions of their own workers and workers employed by their suppliers.¹⁷¹ The Ninth Circuit Court of Appeals agreed, holding that supply contract terms, such as deadlines and prices, "do not constitute an 'immediate level of "day-to-day"' control over a supplier's employees so as to create an employment relationship between a purchaser and a supplier's employees."¹⁷²

Although the Ninth Circuit was not persuaded to hold Wal-Mart accountable for injuries to the employees of its suppliers, competing precedent and variations on basis for vicarious liability may support similar claims in the future. The facts relevant to control in *Wal-Mart Stores, Inc.* were similar to those in *Doe I v. The Gap, Inc.*, where the court found sufficient allegations of day-to-day control to state a RICO claim.¹⁷³ In *Doe I v. Exxon Mobil*, the district court found an exception to the general rule that employers are not liable for the actions of their independent contractors when the conduct is inherently dangerous.¹⁷⁴ Finally consider the precedent that a company can be liable for aiding and abetting another entity to commit human rights abuses, which includes "knowing 'practical assistance, encouragement, or moral

¹⁶⁷ *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009).

¹⁶⁸ *Id.* at 680–84. Plaintiffs relied on the following text "in the Standards: 'Wal-Mart will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor said standards.'" *Id.* at 681.

¹⁶⁹ *Id.* at 682–83.

¹⁷⁰ *Id.*

¹⁷¹ *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007).

¹⁷² *Wal-Mart Stores, Inc.*, 572 F.3d. at 683 (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121, 127–28 (Cal. Ct. App. 2004)) (rejecting allegations that the company had meaningful control over workers' wages and hours, operative tasks, and supervision of production). See Appellants' Opening Brief, *supra* note 158, at 7–8.

¹⁷³ See *supra* notes 130–34 and accompanying text.

¹⁷⁴ *Doe I v. Exxon Mobil Corp.*, No. Civ.A.01-1357(LFO), 2006 WL 516744, at *3 (D.D.C. Mar. 2, 2006) (holding employer liable because of the "inherently dangerous" exception to the no-liability rule).

support which has a substantial effect on the perpetuation of the crime.”¹⁷⁵ Depending on the nature of the relationship between a MNC and its supplier, particularly concerning the MNC’s control over the conduct that caused the injury, the court may find a duty to the workers.

Because states vary on which public policy considerations justify recognizing a duty, it is difficult to predict whether a particular court would find a duty to factory workers arising from a relationship between the MNC and the supplier.¹⁷⁶ Some courts may recognize a duty on policy grounds when a company publicly represents the purpose of its code of conduct to ensure fair labor conditions for workers in its supply factories. This interpretation would be consistent with state and federal laws on false advertising and unfair competition, which reflect a policy against misleading consumers.¹⁷⁷ If courts continue to find no duty, MNCs may be subject to a legislatively-created duty at the state or federal level.

Alternatively, a corporation may avoid liability by arguing that its decision to contract with international suppliers is protected by the “business judgment” rule, which recognizes the duty to preserve corporate assets and establishes a presumption of good faith.¹⁷⁸ Unless the injury is an intentional tort, the company can argue that its duty of care to maximize shareholder profits protects its decision to enter contracts that reduce labor costs. In addition, the company can present a defense of consent or contributory negligence by showing that plaintiffs voluntarily accepted employment and continued to work in supply factories despite allegedly harmful labor conditions.

5. *Third-Party Beneficiary Breach of Contract*

Like tort law, third-party beneficiary claims require plaintiffs to establish that a duty to the plaintiff exists. Contract law allows a person to “sue for damages resulting from the breach of a contractual obligation, even though he was not a party to the contract and had no knowledge of it when made, if he was an intended beneficiary of that obligation.”¹⁷⁹ Both contract and tort remedies are available, including money damages

¹⁷⁵ See discussion on *Bowoto v. Chevron Texaco Corp.* and *John Doe I v. Unocal Corp.* *supra* note 98 and accompanying text.

¹⁷⁶ See appendix in Lake, *supra* note 165, for a fifty-state comparison on the jurisprudence of duty.

¹⁷⁷ See *supra* notes 157–59 and accompanying text. *But see* Lynn v. Wal-Mart Stores, Inc., 280 S.W.3d 574, 577, 579 (Ark. Ct. App. 2008) (rejecting former employee’s allegation that Wal-Mart violated “Arkansas’s public policy against falsifying business records and protecting the consumer from the deceptive trade practice of making a false representation concerning the source or certification of goods,” on grounds that violating its private, internal policies does not implicate Arkansas’ public policy).

¹⁷⁸ *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (“A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment.”).

¹⁷⁹ *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1524 (10th Cir. 1997).

and equitable remedies.¹⁸⁰ To determine whether the contracting parties intended a third-party beneficiary, courts will look first at the terms of the contract, and if the terms are ambiguous, will consider the facts and circumstances surrounding its execution.¹⁸¹

In *Wal-Mart Stores, Inc.*, plaintiff factory workers raised another novel claim alleging that Wal-Mart's "Standards for Suppliers" (Standards)¹⁸² are expressly part of the contract between the MNC and its supplier that requires the supplier to comply with local labor laws and reserves the right of Wal-Mart to inspect supplier factories to ensure compliance with the Standards.¹⁸³ The plaintiffs argued that Wal-Mart intended this provision as a promise to enforce the code, demonstrated by public statements that it conducts business with suppliers who are in compliance and does not condone violations.¹⁸⁴ Similarly, the plaintiffs argued that Wal-Mart's publicly announced purpose for requiring compliance with the Standards—to encourage suppliers to make changes that improve the lives of workers in foreign factories—established that the factory workers are the intended beneficiaries of the contract.¹⁸⁵ As third-party beneficiaries, the plaintiffs asserted standing to sue Wal-Mart for breaching the contract by overlooking violations of the Standards.¹⁸⁶ Plaintiffs alleged that Wal-Mart negligently breached or caused the breach of the Standards by failing to supervise the suppliers' compliance adequately and by creating price pressure on its suppliers that made compliance impossible.¹⁸⁷

The California district court granted the defendant's motion to dismiss for failure to state a claim, holding that the facts did not support claims that the plaintiffs were intended beneficiaries or that Wal-Mart

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Wal-Mart Stores, Inc., Standards for Suppliers (Jan. 2009), <http://walmartstores.com/download/2727.pdf>. Wal-Mart's "Standards for Suppliers" requires adherence to all local laws and industry standards, and additional labor and employment conditions regarding compensation, hours of labor, forced labor, child labor, discrimination, and freedom of association. *Id.*

¹⁸³ Appellants' Opening Brief, *supra* note 158, at 9–10.; Wal-Mart Stores, Inc., *supra* note 182 ("Wal-Mart requires its suppliers, and their contractors, to meet the following standards, and reserves the right to make periodic, unannounced inspections of suppliers' facilities and the facilities of suppliers' contractors to ensure suppliers' compliance with these standards").

¹⁸⁴ Appellants' Opening Brief, *supra* note 158, at 7–9.

¹⁸⁵ *Id.* at 8–9.

¹⁸⁶ *Id.* at 9–10.

¹⁸⁷ *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *1–4 (C.D. Cal. Mar. 30, 2007) (alleging only eight percent of Wal-Mart's audits in 2004 were unannounced, workers were coached for interviews with inspectors, inspectors are pressured to produce positive reports to avoid disruption of Wal-Mart's business, and that Wal-Mart was aware that its auditing process may be the main enforcement mechanism where the local government does not routinely enforce labor laws).

promised to enforce compliance with the code of conduct.¹⁸⁸ The court noted further that even if the plaintiffs were third-party beneficiaries to the Standards, their claim would be against their employer (the supplier) for breach, not against Wal-Mart.¹⁸⁹ And in that case, the court added, it would be illogical for the suppliers to bargain for a benefit from Wal-Mart to enforce the Standards against themselves.¹⁹⁰ The Court of Appeals affirmed, holding that the text of the Standards neither created a duty for Wal-Mart to monitor the supplier nor a right of action against Wal-Mart by the plaintiffs.¹⁹¹

Despite the plaintiffs' loss in Wal-Mart, a third-party beneficiary claim may be reviewed more favorably by other circuits. The facts are similar to *Wolfgang v. Mid-America Motorsports, Inc.*, where the Tenth Circuit Court of Appeals upheld a \$1.2 million verdict to a racecar driver who claimed he was an intended beneficiary of a contract between the speedway owner and a race promoter.¹⁹² In *Wolfgang*, the court found that a provision in the contract reserving the right of the race promoter to cancel any event due to unsafe racing conditions was clearly intended on its face to insure the safety of the drivers and established the driver as a third-party beneficiary.¹⁹³ The court also considered extrinsic evidence to support this conclusion.¹⁹⁴ The Tenth Circuit did not distinguish between intended beneficiaries and incidental beneficiaries. Given this precedent, a court reasonably could conclude that the factory worker plaintiffs in *Wal-Mart Stores, Inc.* were intended third-party beneficiaries.

Even if the Ninth Circuit Court of Appeals had concluded that the factory workers in *Wal-Mart Stores, Inc.* were third-party beneficiaries, the plaintiffs would have had the burden to demonstrate that Wal-Mart breached the contract. If Wal-Mart's only promise was to purchase goods, then Wal-Mart performed fully. On the other hand, if Wal-Mart had promised to monitor and enforce the Standards, then failure to do so would have constituted a breach. In *Wolfgang*, the court interpreted the clause, "shall have the right to cancel any event due to unsafe racing conditions" to mean that "under the terms of the contract, [the race promoter] was to cancel 'any event' if the racing conditions were unsafe."¹⁹⁵ Similarly, Wal-Mart's Standards provide that Wal-Mart "reserves the right to . . . inspections of suppliers' facilities . . . to ensure suppliers' compliance with these standards."¹⁹⁶ Therefore, a court could

¹⁸⁸ *Id.* at *3-4.

¹⁸⁹ *Id.* at *3.

¹⁹⁰ *Id.* at *3-4.

¹⁹¹ *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681-82 (9th Cir. 2009).

¹⁹² *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1520, 1525 (10th Cir. 1997).

¹⁹³ *Id.* at 1524-25.

¹⁹⁴ *Id.* at 1525.

¹⁹⁵ *Id.* at 1524-25.

¹⁹⁶ *Wal-Mart Stores, Inc.*, *supra* note 182.

reasonably adopt the plaintiffs' theory that the promise obligated Wal-Mart to enforce the Standards.

As with other causes of action, MNCs should consider the consequences of a third-party beneficiary to a contract claim beyond the court's decision. The public may perceive a defense that the company's code of conduct was not intended to benefit the workers as an abdication of responsibility for sweatshop conditions in its supplier factories. As Nike evidenced in the early 1990s, that stance can invoke consumer backlash. Moreover, it can provide evidence of false advertising on grounds that the company promoted itself as committed to improving labor conditions. The fact that a corporation distinguishes between its intent to improve labor conditions and to provide an express cause of action for factory workers to sue them may not sit well in public relations.

6. *Unjust Enrichment*

Unjust enrichment is an independent cause of action despite its frequent association with contract law. The elements are injustice and enrichment, and the remedy is restitution to the plaintiffs for the benefit received. Again, *Jane Doe I v. Wal-Mart Stores, Inc.* is the only case to raise an unjust enrichment claim to hold a corporation liable for profiting from sweatshop labor.¹⁹⁷ The plaintiffs alleged that Wal-Mart was enriched by unreasonably low-cost labor under contracts with suppliers who inadequately compensated workers.¹⁹⁸ They alleged it was unjust because (1) Wal-Mart's business practices prevented the supplier from complying with the Standards (e.g., last minute order changes requiring unlawful overtime to meet deadlines or contract prices that cannot reasonably support legally required wages), and (2) Wal-Mart benefitted from the goodwill established by its public commitment to require supplier compliance without actually enforcing its Standards.¹⁹⁹ The trial court dismissed this claim on grounds that the link between the benefit and plaintiffs was too attenuated to support a claim for restitution.²⁰⁰

The Ninth Circuit Court of Appeals affirmed, noting "Plaintiffs essentially seek to disgorge profits allegedly earned by Wal-Mart at Plaintiffs' expense; however, we have already determined that Wal-Mart is not Plaintiffs' employer, and we see no other plausible basis upon which the employee of a manufacturer, *without more*, may obtain restitution from one who purchases goods from that manufacturer."²⁰¹ As with the plaintiffs' negligence claims, the court did not consider Wal-Mart's public statements as implying a relationship to the workers.²⁰² Arguably, its

¹⁹⁷ *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; Appellants' Opening Brief, *supra* note 158, at 7-8.

²⁰⁰ *Wal-Mart Stores, Inc.*, 2007 WL 5975664 at *5-6.

²⁰¹ *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 685 (9th Cir. 2009) (emphasis added).

²⁰² *Id.* at 684.

representation to the public that it intended to protect workers from unsuitable working conditions constitutes the “*more*” needed to establish a prior relationship.

An unjust enrichment theory is perhaps the least viable of the anti-sweatshop causes of action. If Wal-Mart had a valid contract with the supplier that included negotiated labor costs, a court would not look to the sufficiency of consideration. So, as long as the supplier entered the contract without duress or fraud, Wal-Mart legally contracted for labor.²⁰³ Perhaps a stronger claim would be that Wal-Mart had sufficient control over the production operations to establish an agency relationship with the supplier, the supplier benefitted from violating the standards, and thus Wal-Mart is vicariously liable for the unjust enrichment of suppliers. However, the ambiguity of the injustice element begs the question: whose standards of injustice should the court apply—U.S. labor standards, the law where the factory is located, or international law? Like tort and contract claims, perhaps the most pernicious consequence of an unjust enrichment claim is negative public relations. To defend against the claim, the MNC risks harm to its brand by rejecting ownership of any unjustness inherent in the supply chain.

C. *MNC Liability Remains Uncertain*

While MNCs have fared well in litigation to date, the risk of liability is tangible. Claims under the ATCA may establish minimum international labor standards in common law that supersede lesser standards enforced under codes of conduct. Courts have recognized that the relationship between MNCs and suppliers operating under lax enforcement of a code of conduct is sufficient to state a claim under RICO, and extraterritorial application of RICO is permissible when the underlying unlawful conduct occurred in the United States. The U.S. Supreme Court considered, and left open, the authority of states to regulate the promotion of codes of conduct under state false-advertising and unfair-competition laws. Factory workers can bring common law tort claims, including direct negligence and negligence by agency or vicarious liability, against MNCs for hiring, retaining, and supervising suppliers known to operate sweatshops, as well as negligently undertaking efforts to improve labor conditions through its code of conduct. And despite the lack of case law support for claims alleging that codes of conduct give rise to third-party rights, MNCs undermine their efforts to enhance brand image with codes of conduct when they renege responsibility for sweatshop conditions to defend against these claims.

²⁰³ If the relationship between the suppliers and the factory workers was not contractual, but an informal arrangement, the workers might have an unjust enrichment claim against the suppliers if the host country has the equivalent cause of action available.

IV. PUBLIC LAW MAY SUPPLANT INEFFECTIVE CODES OF CONDUCT

Anti-sweatshop litigation is often high profile and may have consequences in the political sphere regardless of the outcome in court. This Part discusses two ways that government oversight of the international supplier chain is increasing: indirectly as a consumer, through the adoption of sweat-free procurement policies; and directly as a regulator, through existing law or developing legislation.

A. *Sweat-Free Procurement Policies Reflect Government as Consumer*

State and local governments wield their purchasing power through procurement policies that prohibit sweatshop-produced goods.²⁰⁴ According to SweatFree Communities, 187 government entities in the United States have sweat-free procurement policies and resolutions (as of November 2008).²⁰⁵ SweatFree Communities developed a Model Code of Conduct and Sweatfree Procurement Policy and provides a variety of resources to support campaigns for sweat-free procurement policies.²⁰⁶ In 2008 alone, the State of Vermont, two Oregon cities, and a county in Ohio adopted sweat-free policies.²⁰⁷ While these initiatives do not regulate MNCs, they may result in greater pressures for MNCs to eliminate sweatshop labor or risk losing their profitable domestic purchasers.

For example, the Director of Maine's Division of Purchases notified Cintas Corporation, a Maine uniform vender, that continued business

²⁰⁴ For example, between 2005 and 2007, state agencies in New Jersey "purchased more than \$7 million worth of apparel for uniformed staff, employees and individuals for whom the State provides clothing, and linens in [the] State correctional and developmental institutions." *Overseas Sweatshop Abuses, Their Impact on U.S. Workers, and the Need for Anti-Sweatshop Legislation: Hearing Before the S. Subcomm. on Interstate Comm., Trade and Tourism, Comm. on Commerce, Science and Transportation, 110th Cong., at *2 (2007) [hereinafter Socolow Statement]* (statement of David J. Socolow, N.J. Labor Comm'r), available at http://lwd.dol.state.nj.us/labor/lwdhome/press/2007/Sweatshop_testimony_Socolow.pdf.

²⁰⁵ SweatFree Communities, Adopted Policies, <http://sweatfree.org/policieslist> (as of November 2008, policies have been adopted by 8 states, 39 cities, 15 counties, 4 dioceses, 118 school districts, and 4 individual high schools, resulting in procurement policies by at least 1 government entity in 19 states: California, Colorado, Illinois, Maine, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin). SweatFree Communities is a national network of advocates for fair labor standards in public procurement that works with state and local governments, students, workers, unions, faith-based groups, and community organizations to promote sweat-free procurement policies. SweatFree Communities, About Us, http://sweatfree.org/about_us.

²⁰⁶ SWEATFREE COMMUNITIES, MODEL CODE OF CONDUCT AND SWEATFREE PROCUREMENT POLICY 5.0 (2008), http://www.sweatfree.org/docs/sample_code.pdf.

²⁰⁷ Adopted Policies, *supra* note 205; Portland, Or., City Resolution 36527, Sweatshop Free Procurement Policy Aug. 29, 2007), available at <http://www.portlandonline.com/shared/cfm/image.cfm?id=218025>.

was contingent on its compliance with the state's sweat-free requirements:

We expect that you will respond constructively to the report, by working with your suppliers, the State of Maine and other organizations as necessary to ensure that any labor rights and human rights violations are corrected and conditions for workers are improved. We also expect that you will maintain your businesses with these facilities. "Cutting and running" from factories where worker rights violations have occurred does nothing for the affected workers and will be viewed by the State of Maine as a serious violation of our anti-sweatshop requirements.²⁰⁸

Similar letters to apparel companies followed release of the Sweatfree Communities report, including letters from the State of Wisconsin, the State of Ohio, the City of Harrisburg, Pennsylvania, and the City of Austin, Texas.²⁰⁹

The State of New Jersey established a procurement policy in 2002 requiring that all apparel purchased by the state be manufactured in the United States under fair labor conditions, and that all contractors certify that subcontractors meet the following requirements: "their workers are paid a 'non-poverty wage'; workers are afforded a mechanism to resolve employer-employee disputes; the employer is committed to neutrality in regard to union organizing efforts; and that workers are afforded a safe and healthy work environment free from discrimination."²¹⁰

In 2006, the Governor of New Jersey joined the national State and Local Government Sweatfree Consortium, established "with the goal of ending the use of state taxpayer funds to purchase apparel manufactured in sweatshops."²¹¹ The Consortium has five key functions: "1) To certify sweatfree compliant vendors/factories; 2) Maintain a public database of approved factories; 3) Assist governments and vendors in working with the system of approved suppliers where factories meet the code of

²⁰⁸ Letter from Betty M. Lamoreau, Dir., Div. of Purchases, State of Me. Dep't of Admin. & Fin. Servs., to Rob McKillop, Cintas Corp. (June 17, 2008), in SWEATFREE COMMUNITIES, SUBSIDIZING SWEATSHOPS: HOW OUR TAX DOLLARS FUND THE RACE TO THE BOTTOM, AND WHAT CITIES AND STATES CAN DO 52 (2008) [hereinafter SWEATFREE COMMUNITIES], available at http://www.sweatfree.org/docs/subsidizing_sweatshops_lr_color.pdf.

²⁰⁹ Letter from Michael L. Morgan, Sec'y of Admin., Wis. Dep't of Admin., to Bob Barker Co. (June 27, 2008), in SWEATFREE COMMUNITIES, *supra* note 208, at 51; Letter from Betty M. Lamoreau, Dir., Div. of Purchases, State of Me. Dep't of Admin. & Fin. Servs., to Rob McKillop, Cintas Corp. (June 17, 2008), in SWEATFREE COMMUNITIES, *supra* note 208, at 52; Letter from Jeffrey I. Mandel, Chief Procurement Officer, Commonwealth of Pa, Dep't of Gen. Servs., to Jill Skethway, Atl. Tactical (June 27, 2008), in SWEATFREE COMMUNITIES, *supra* note 208, at 53; Letter from Sam D. Dominguez, Material Control Manager, City of Austin, to Brian Duffy, Fechheimer Bros. Co., in SWEATFREE COMMUNITIES, *supra* note 208, at 54; Letter from Maureen McGuire, Procurement Manager, Ohio Dept. of Admin. Servs., to Jay Salyers, Lion Apparel (July 1, 2008), in SWEATFREE COMMUNITIES, *supra* note 208, at 55.

²¹⁰ Socolow Statement, *supra* note 204, at *2-3.

²¹¹ *Id.* at *4.

conduct requirements; 4) To maintain support functions in the monitoring process; and 5) To market sweatfree procurement efforts.”²¹²

The United States government has a related policy embodied in the Walsh-Healey Public Contracts Act, that every federal contract “for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000”²¹³ must address the “qualifications of contractors, minimum wages, overtime pay, safe and sanitary working conditions of workers employed on the contract, the use of child labor or convict labor on the contract work, and the enforcement of such provisions.”²¹⁴ As interpreted by the Supreme Court, the Walsh-Healey Public Contracts Act was adopted “to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.”²¹⁵ President Clinton affirmed the nation’s commitment to this Act in a 1999 Executive Order on Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, which included remedies of terminating the contract and suspension from eligibility for federal contracts.²¹⁶

Just as the ATCA cases have the potential to set minimum standards of international labor law, these government policies provide direct competition to corporate codes of conduct as an instrument of private ordering.

B. Federal Laws Enable Government as Regulator

As a matter of practice, the U.S. government does not regulate the conduct of MNCs in the international supply chain. However, two federal laws—The Federal Trade Commission Act and The Federal Corrupt Practices Act—provide the necessary authority should the political will arise. This Part discusses those statutes as well as potential legislation to prohibit the sweatshop trade in the United States.

²¹² Office of Lab. Standards Enforcement, Meeting Minutes of Sweatfree Procurement Advisory Group (Oct. 16, 2008), <http://sfgsa.org/index.aspx?page=531>.

²¹³ Walsh-Healey Act, 41 U.S.C. § 35 (2006).

²¹⁴ The Walsh-Healey Public Contracts Act, 41 C.F.R. § 50-201.1 (2008).

²¹⁵ *Id.* (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128 (1940); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 502 (1943)).

²¹⁶ Exec. Order No. 13,126, 3 C.F.R. 195 (1999), *reprinted in* 41 U.S.C. § 35 (2006) (“It shall be the policy of the United States Government, consistent with the Tariff Act of 1930, 19 U.S.C. 1307, the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, and the Walsh-Healey Public Contracts Act, 41 U.S.C. 35 *et seq.*, that executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor.”).

1. *Federal Trade Commission Act*

The Federal Trade Commission Act (FTCA) proscribes “unfair or deceptive acts or practices in or affecting commerce”²¹⁷ The FTCA defines “unfair or deceptive acts or practices” to include “acts or practices involving foreign commerce that—(i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States.”²¹⁸ The statute provides that all remedies available to the Federal Trade Commission (FTC) “with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.”²¹⁹

The FTCA does not provide a private cause of action, but the FTC has broad discretion in its choice of remedies, so long as the remedy has some reasonable relation to the unlawful practice.²²⁰ The typical remedy is a cease-and-desist-order, but other possibilities include fencing-in provisions,²²¹ affirmative disclosure orders, and corrective advertising.²²² Civil penalties are also available if a company violates the FTC order subsequent to a finding of illegality.²²³

Merely posting a code of conduct on the company website may be sufficient to violate the FTCA.²²⁴ The FTCA prohibits any representation, omission or practice directed towards the consumer population that is likely to mislead consumers, acting reasonably under the circumstances in a material respect.²²⁵ A misrepresentation or omission “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”²²⁶ The FTC considers “whether the act or practice is likely to mislead, rather than whether it causes actual deception.”²²⁷ Injury to consumers likely exists if consumers would have chosen differently but for the deception.²²⁸ Injury to

²¹⁷ 15 U.S.C. § 45(a)(1) (2006).

²¹⁸ *Id.* § 45(a)(4)(A).

²¹⁹ *Id.* § 45(a)(4)(B). Note the similarity these element to common law tests for extraterritorial application of RICO.

²²⁰ Lu, *supra* note 28, at 617.

²²¹ See *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (FTC can prohibit practices similar to the illegal practice).

²²² FTC, ADVERTISING PRACTICES FREQUENTLY ASKED QUESTIONS: ANSWERS FOR SMALL BUSINESS 7–8 (2001), <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus35.pdf>.

²²³ 15 U.S.C. § 45(m); Lu, *supra* note 28, at 617.

²²⁴ Lu, *supra* note 28, at 621–22.

²²⁵ *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175 (1984).

²²⁶ *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (quoting *In re Cliffdale Assocs., Inc.*, 103 F.T.C. at 165); see also *In re Cliffdale Assocs., Inc.*, 103 F.T.C. at 182 (materiality will be presumed when the seller knew or should have known that ordinary consumer would need omitted information to know the claim was false); FTC, *supra* note 222, at 3–5.

²²⁷ *In re Cliffdale Assocs., Inc.*, 103 F.T.C. at 176 (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)).

²²⁸ *In re Cliffdale Assocs., Inc.*, 103 F.T.C. at 175–76.

competitors exists when there is injury to consumers, “because consumers who preferred the competitor’s product are wrongfully diverted.”²²⁹ Some branded apparel corporations post their codes of conduct on the company website, typically presented as an illustration of the company’s commitment to social responsibility.²³⁰ The FTC may characterize an unenforced code of conduct as a material misrepresentation directed at consumers that the company polices the labor practices of its suppliers and leads consumers to purchase in reliance on the representation that the company sells sweat-free goods.²³¹

2. Federal Corrupt Practices Act

The Federal Corrupt Practices Act (FCPA) proscribes U.S. corporations or anyone acting on their behalf from knowingly offering a bribe of money or anything of value to any foreign official for the purpose of obtaining or retaining business.²³² U.S. courts retain jurisdiction over acts of U.S. corporations outside of the United States that violate the FCPA.²³³ Firms are subject to criminal and civil penalties with fines up to \$2 million, and officers, directors, stockholders, employees, and agents can be fined up to \$100,000 and/or imprisoned for up to five years.²³⁴ In 2006, the United States ratified the United National Convention Against Corruption (UNCAC), which strengthens provisions of the FCPA.²³⁵ Unlike the FTCA, the FCPA establishes a private cause of action for treble damages under RICO or other federal or state laws.²³⁶

Under the FCPA, corporations are liable for payments to a third party if the company knows that some or all of that payment will be used to bribe a government official.²³⁷ In countries where bribery of local labor inspectors is routine, a court may find that MNCs should know that their

²²⁹ *Id.* at 183 n.58.

²³⁰ Lu, *supra* note 28, at 620–21.

²³¹ Consider the parallel between sweat-free and green advertising. See Rosch, *supra* note 27, at 20 (FTC Commissioner states his view that the FTC should regulate environmental marketing claims, such as “environmentally friendly” textiles, “if the incidence of deceptive claims increases or the enforcement alternatives dissipate”).

²³² 15 U.S.C. §§ 78dd-1(a), 78dd-3(a), 78ff (2006); see Fleming, *supra* note 98, at 50-6.

²³³ Fleming, *supra* note 98, at 50-6.

²³⁴ *Id.* at 50-7.

²³⁵ WILEY REIN LLP, FOREIGN CORRUPT PRACTICES ACT HANDBOOK 15 (2007), available at <http://www.wileyrein.com/resources/documents/pu4188.pdf>.

²³⁶ Fleming, *supra* note 98, at 50-8.

²³⁷ Aaron Grieser, Comment, *Defining the Outer Limits of Global Compliance Programs: Emerging Legal & Reputational Liability in Corporate Supply Chains*, 10 OR. REV. INT’L L. 285, 301–02 (2008) (citing 15 U.S.C. § 78dd-1(a)(3) (1998)). Labor, environmental, and human rights organizations considered the FCPA as a model for the International Right to Know Campaign, advocating mandatory disclosure by MNCs of environmental practices by their international suppliers. See David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353, 378–79 (2005).

suppliers are likely to use part of MNC payments for that purpose. The presumption of such knowledge may be even greater when a code of conduct requires suppliers to comply with local laws, because it provides an incentive for suppliers to bribe local labor inspectors to protect a lucrative contract with the MNC. Alternatively, if a supplier is deemed an agent of the MNC, then the MNC may be directly liable under the FCPA for bribes to local officials. MNCs also may be liable under the FCPA for offering any assurances to a foreign government that contractual relations with their supplier factories will continue so long as enforcement of labor standards remains lax. Although no money directly changes hands in such an arrangement, the promise of substantial capital investment by an MNC could be construed analogously.²³⁸

3. *Legislative Activity*

A 2006 Harris Poll commissioned by the National Labor Committee surveyed 1,002 American adults about the degree to which they agreed with the following statement: "I want my Member of Congress to support legislation to protect human rights in the global economy by prohibiting the import or sale of sweatshop goods in the U.S. which were made under conditions violating internationally recognized worker rights standards."²³⁹ Seventy-five percent said they totally or somewhat agreed.²⁴⁰ Since then, the Decent Working Conditions and Fair Competition Act ("the Act") has been introduced in Congress five times, co-sponsored by President (then Senator) Obama and Hillary Clinton in 2007.²⁴¹ Chances

²³⁸ Professor David Weissbrodt suggests that MNCs can use their power and mobility "to evade national laws and enforcement, because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses." David Weissbrodt, *Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373, 375 (2008).

²³⁹ The National Labor Committee (NLC), *Harris Poll: Americans Want Legal Protections for Workers in the Global Economy*, <http://www.nlcnet.org/article.php?id=75>. The NLC is a non-profit organization established in 1981 to combat sweatshops. Previously affiliated with the AFL-CIO, the NLC was behind the sweatshop exposé of Wal-Mart's Kathie Lee Gifford line of clothing. Lynne Duke, *The Man Who Made Kathie Lee Cry*, WASH. POST, Jul. 31, 2005, at D01, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/30/AR2005073001413_pf.html.

²⁴⁰ NLC, *supra* note 239.

²⁴¹ See Ed Brayton, *Obama and Clinton Sponsor Anti-Sweatshop Legislation*, THE MICH. MESSENGER, Feb. 15, 2008, <http://michiganmessenger.com/869/obama-and-clinton-sponsor-anti-sweatshop-legislation>. In the 109th Congress (2005–2007), Senate Bill 3485 was introduced in the Senate and House Bill 5635 in the House. The National Labor Committee, *Decent Working Conditions and Fair Competition Act*, <http://www.nlcnet.org/article.php?id=120>. In the 110th Congress (2007–2009), Senate Bill 367 and House Bill 1992 were introduced; House Bill 5635 had sixty-six co-sponsors. The National Labor Committee, *Anti-Sweatshop Legislation Reintroduced in the Senate and House*, <http://www.nlcnet.org/article.php?id=242>. The bill was drafted by the NLC, the United Steelworkers of America, and Senator Bryan Dorgan (D-ND). The National Labor Committee, *Decent Working Conditions and Fair Competition Act*, <http://www.nlcnet.org/article.php?id=120>.

are good that this proposal or others that establish penalties for MNCs that sell sweatshop-produced goods will be adopted within a few years.

a. Decent Working Conditions and Fair Competition Act

The proposed Act would prohibit the import, export, or sale of goods made in factories or workshops that violate core labor standards, and prohibits the procurement of sweatshop goods by the United States Government.²⁴² It defines core labor standards in accordance with the ILO core labor standards and U.S. laws, recognizing four rights associated with core labor standards: the right of workers to be free from sweatshop working conditions, the right of consumers to know that the goods they purchase are not produced in sweatshops, the right of businesses to be free from competition with companies that use sweatshop labor, and the right of shareholders to know that their investments are not supporting sweatshop labor.²⁴³ The Act would amend the Tariff Act of 1930²⁴⁴ and expand the authority of the Federal Trade Commission to enforce violations of the Act.²⁴⁵ In addition, it would create a private right of action against sellers of sweatshop goods by competitors and investors.²⁴⁶ Remedies include injunctive relief, damages of \$10,000 per violation or the fair market value of the goods, whichever is greater, or greater damages at the court's discretion if it finds intentional violations, and attorneys' fees and costs.²⁴⁷

One reason this Act has never passed beyond the committee level is concern about its potential to decrease MNC transparency and sharing of social audit data and to discourage collaboration among MNCs and their common contractors to solve compliance challenges.²⁴⁸ However, testimony at the bill's hearings also reflected the typical differences of

²⁴² Decent Working Conditions and Fair Competition Act, S. 3485 109th Cong. (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&dodid=f:s3485is.txt.pdf.

²⁴³ *Id.* § 2–3 (including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health).

²⁴⁴ Plaintiffs have tried unsuccessfully to rely on the Tariff Act of 1930 in its current form. In *International Labor Rights Fund v. Bush*, the court dismissed a lawsuit seeking declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., for Commissioner of Customs and Border Protection's failure to investigate alleged forced child labor in the cocoa industry of Cote d'Ivoire in violation of § 307 of the Tariff Act of 1930, because the Court of International Trade has exclusive jurisdiction over claims that arise out of any law providing for embargoes, including § 307. 357 F. Supp. 2d 204, 205–06, 209 (D.D.C. 2004).

²⁴⁵ S. 3485, § 202(f). The Act requires the FTC to publish a list of violators twice annually in the Federal Register and on its website. *Id.*

²⁴⁶ *Id.* § 202(c). Notably, the Act would not allow workers, unions, and non-governmental organizations to bring a private action. *Id.*

²⁴⁷ *Id.* § 202(d).

²⁴⁸ Rachelle Jackson, *Labour Standards in America: A Legal Ban on Sweatshops?*, ETHICAL CORP., Jun. 5, 2007, available at <http://www.ethicalcorp.com/content.asp?ContentID=5137&ContTypeID=>.

opinion along party lines regarding the effects of globalization.²⁴⁹ Given his former co-sponsorship of this bill, Obama's Administration may be favorable to its re-introduction.

b. Other Possible Legislation

In 2000, Representative Cynthia McKinney introduced the Corporate Code of Conduct Act that would require U.S. corporations employing twenty or more persons in a foreign country, either directly or through a subsidiary, to implement a corporate code of conduct including twelve express minimum requirements.²⁵⁰ The law would create several incentives for compliance, such as preferences in the award of federal contracts. Enforcement provisions would authorize individuals to request compliance investigations by the government, which may result in penalties, such as contract termination, loss of contractual preference eligibility, and civil action in federal court. The bill had no Republican co-sponsors and failed on party lines.²⁵¹

During his campaign, President Obama expressed a broader commitment to add binding obligations to existing and future trade agreements that protect the core labor standards recognized by the ILO.²⁵² Thirty-four newly elected members of Congress also indicated support for fair labor practices in the international market.²⁵³ Aside from trade agreements, the federal government can direct the conduct of U.S.-based MNCs in several ways. One approach is to provide MNCs with direct incentives to improve labor conditions in their supplier factories, such as tax deductions or government subsidies for meeting certain guidelines. Another approach is to facilitate brand differentiation strategies by establishing "sweat-free" labeling regulations under the Federal Trade Commission Act. Alternatively, Congress could adopt a more punitive stance and amend RICO, ATCA, or federal labor laws to ease jurisdictional barriers for foreign workers and allow courts to consider sweatshop claims on their merits.

²⁴⁹ *Id.*

²⁵⁰ Corporate Code of Conduct Act, H.R. 4596, 106th Cong. § 2(a) (2000), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4596ih.txt.pdf. See Mark B. Baker, *Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?*, 23 CONN. J. INT'L L. 123, 155-58 (2007).

²⁵¹ Baker, *supra* note 250, at 156.

²⁵² Letter from Barack Obama, Obama for America, to Iowa Fair Trade Campaign (Dec. 26, 2007), available at http://www.citizen.org/documents/Obama_IFTC.pdf.

²⁵³ PUBLIC CITIZEN, CLOSING SANTA'S SWEATSHOP: HOW TO DELIVER ON OBAMA'S AND CONGRESS' TOY-SAFETY AND FAIR-TRADE PROMISES 4-5, 16 (2008), <http://www.citizen.org/documents/SantasSweatshop08.pdf> (advocating international labor standards to level the playing field for American producers, protect the quality of products sold in the U.S., and discourage U.S. companies from moving manufacturing operations overseas to take advantage of cheap labor). While protectionism may be a motivating factor, sub-par labor standards in the supply chain are the target.

C. *Codes of Conduct Compete with Public Law for Governance of the Supply Chain*

MNCs have invested in codes of conduct primarily to preserve the benefits of corporate self-regulation, including lower business costs and greater responsiveness to market changes and public demand. External governance, in contrast, presents more uncertainty and less predictability for business interests. Yet, without an effective alternative presented by the private market, the growth of anti-sweatshop procurement policies is certain, and the potential for regulatory and statutory restrictions is likely to grow.

V. SUSTAINABLE CODES OF CONDUCT BALANCE
BUSINESS AND LABOR INTERESTS

For now, corporate codes of conduct remain the principal instrument of regulation of labor standards in the international supply chain. MNCs can strengthen their ability to maintain this control by adopting a sustainability business model that includes four essential commitments: accurate planning, fair wages, efficient monitoring, and effective enforcement.

Sustainability builds on the idea of corporate social responsibility, merging socially responsible conduct with opportunities to profit from previously untapped markets.²⁵⁴ This model carries all the benefits of CSR, such as “attracting and retaining a higher-quality workforce,” improving the company’s reputation among consumers, attracting investment from socially concerned investors, protecting the value of the company’s trademark, avoiding liability, and staying ahead of new, stricter regulations.²⁵⁵ To that baseline, sustainability adds an interest in tapping the sweatshop-free market as a growth industry.²⁵⁶

A. *Sustainable Codes of Conduct Improve Labor Conditions*

A review of the literature by labor and business experts suggests that the capacity for codes of conduct to improve labor conditions will be greatest if they incorporate four objectives.

²⁵⁴ David Grayson, *Foreword* to JEM BENDELL ET AL., *THE GLOBAL STEP CHANGE: 2007 LIFEWORTH ANNUAL REVIEW OF CORPORATE RESPONSIBILITY* 5–6 (2008), available at <http://lifeworth.com/2007review/pdfs/globalstepchange-2007review.pdf>.

²⁵⁵ Weissbrodt, *supra* note 238, at 376 (citing Erik Assadourian, *The State of Corporate Responsibility and the Environment*, 18 GEO. INT’L L. REV. 571, 574–76 (2006)).

²⁵⁶ Studies show consumers are willing to pay more for sweat-free goods. See B.C. GOV’T AND SERV. EMPLOYEES’ UNION EQUITY & HUMAN RIGHTS, INFORMATION FROM CANADIAN LABOUR CONGRESS’ STOP SWEATSHOP ABUSES WEB SITE 2, http://www.bcgeu.bc.ca/files/About_Sweatshops1.pdf (“More and more consumers are now shopping with a conscience and ask questions about labour conditions in factories where their clothes are made. Many are even willing to pay more to buy ‘sweatshop-free’ clothing because they believe it is the right thing to do.”).

1. *Accurate Planning*

Currently, MNCs bear the cost to monitor suppliers' compliance with codes of conduct, while suppliers are expected to bear the cost of improving labor conditions. This expectation has no bearing on decisions by MNCs to select the lowest bidder. Crowning the hierarchy in the supply chain allows MNCs to dictate prices and lead times.²⁵⁷ A 2004 Oxfam report identifies MNC buying practices as a leading contributor to excessive overtime required of factory workers.

Companies increasingly hold up their 'codes of conduct' to assure the public that they care about labour standards down the chain. But their farm and factory audits still focus on documenting the labour problems that exist, without asking why those problems persist. Many factors can contribute—from poor management to weak national legislation. But one root cause, long overlooked, is the pressures of retailers' and brand companies' own supply-chain purchasing practices, undermining the very labour standards that they claim to support.²⁵⁸

Nike is one of the few companies in the apparel industry to recognize publicly the significance of its buying practices.²⁵⁹ Nike's corporate responsibility director remarked in 2007 that the most important thing planners can do to help improve labor conditions in supplier factories is to be more accurate in their demand-forecasting to help prevent rushed orders of short-notice product modifications, which drive managers of low margin clothes factories to discard overtime rules and falsify record books to cover it up.²⁶⁰

Dale Neef, a business and economy consultant formerly at IBM, contends sustainability is in large part simply a measure of just how well a

²⁵⁷ See Dale Neef, *Monitoring Suppliers: A New Solution to the Conundrum*, ETHICAL CORP., May 9, 2005, http://www.ethicalcorp.com/content_Print.asp?ContentID=3673.

²⁵⁸ OXFAM, *TRADING AWAY OUR RIGHTS: WOMEN WORKING IN GLOBAL SUPPLY CHAINS* 6–7 (2004), available at http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/trading_rights.pdf (finding when major retailers use their concentrated market power in negotiations with producers by demanding “‘just-in-time’ delivery, but tighter control over inputs and standards, and ever-lower prices . . . factory . . . managers typically pass on the costs and risks to the weakest links in the chain: the workers they employ”).

²⁵⁹ Rachele Jackson, *Labour Standards and Ethical Supply Chains: Nike Leads the Way in Redefining the Balanced Scorecard*, ETHICAL CORP., June 20, 2007, http://ethicalcorp.com/content_print.asp?ContentID=5181. Following a 2005–2006 study that was critical of The Gap's purchasing practices, the company claims it is “working to ensure [its] production calendars reflect real manufacturing deadlines, and that [their] teams are more disciplined in their adherence to these deadlines.” GAP INC., *FINDINGS FROM WOMEN WORKING WORLDWIDE'S STUDY OF GAP INC.'S PURCHASING PRACTICES* (2007), http://web.archive.org/web/20071009005840/www.gapinc.com/public/documents/www_study.pdf.

²⁶⁰ Toby Webb, *Nike and Sustainability—Making the Running for Business Ethics*, ETHICAL CORP., Oct. 6, 2007, <http://www.ethicalcorp.com/content.asp?ContentID=5421>.

company manages its day-to-day supply chain operations, because everyday “logistics, purchasing and manufacturing activities in the aggregate . . . create virtually all of the problems associated with . . . exploitation of workers.”²⁶¹ He suggests that “improving sloppy logistics and supply chain practices in western multinationals alone could greatly improve the health and safety of workers globally.”²⁶²

2. *Fair Wages*

Monitoring reports reveal that failure to pay legally required wages and overtime is one of the most common violations of codes of conduct in supplier factories.²⁶³ While MNCs may be concerned that higher labor costs will necessitate higher consumer prices and reduce demand, studies show that even if price increases were passed on entirely to consumers, substantial increases in labor costs would have little effect.²⁶⁴ Researchers from the University of Massachusetts-Amherst and the University of Cape Town studied production costs of a range of apparel items manufactured in the U.S. and Mexico and sold in the U.S.:

Using data from Mexico’s National Economic Census, the study finds that for a men’s casual shirt manufactured in Mexico, direct labor is \$0.50—or 11.2% of the factory’s overall production costs—for an item that the factory sells for \$4.45. The product is sold in the U.S. for a retail price of \$32.00. Thus, direct labor accounts for 1.6% of the final retail price. The authors estimate the impact of wage increases on retail prices. They conclude that doubling the wages of all non-supervisory workers would result in a new retail price of \$32.50, which represents a retail price increase of roughly 1.6%. The study finds similar results for other apparel products manufactured in Mexico.²⁶⁵

The WRC performed similar calculations to determine the likely impact of wage increases on retail prices of a men’s knit shirt manufactured in the Philippines and sold in the U.S. as university sports apparel for a retail price of \$44.00:

In this instance, labor costs, including the salaries of floor supervisors but not higher management, are \$0.69—8.6% of the

²⁶¹ Dale Neef, *Supply Chain Ethics: The Devil is in the Details*, ETHICAL CORP. Apr. 14, 2005, http://www.ethicalcorp.com/content_print.asp?ContentID=3629.

²⁶² *Id.*

²⁶³ *See, e.g.*, BUS. FOR SOC. RESPONSIBILITY EDUC. FUND ET AL., INDEPENDENT UNIVERSITY INITIATIVE FINAL REPORT 7–8 (2000), *available at* <http://www.ns.umich.edu/Releases/2000/Oct00/report.pdf>.

²⁶⁴ WORKERS RIGHTS CONSORTIUM, THE IMPACT OF SUBSTANTIAL LABOR COST INCREASES ON APPAREL RETAIL PRICES 1 (2005), *available at* http://walmart.3cdn.net/884178defb9d403cf4_qum6bnoew.pdf (summarizing research and explaining production costs in the supply chain).

²⁶⁵ *Id.* at 2 (citing Robert Pollin et al., *Global Apparel Production and Sweatshop Labor: Can Raising Retail Prices Finance Living Wages?* tpls.5–7 (Univ. of Mass.-Amherst Political Econ. Research Inst., Working Paper No. 19, 2002), http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_1-50/WP19.pdf).

factory's overall production costs for the garment. Labor costs represent 1.56% of the final retail price. A 50% wage increase would result in a retail price increase of 0.78%, for a new retail price of \$44.34. Doubling wages would result in a retail price increase of 1.54%, with a new retail price of \$44.69. Tripling wages would result in a new retail price of \$45.38, an increase of 3.03% over the initial price. In each case, it is assumed that the entire increase in labor costs is passed along to consumers.²⁶⁶

While disagreement exists on whether MNCs should pay a "livable wage" or merely minimum wages required by local laws, the argument is semantic when workers are receiving less than the amount required by local laws. The critical question is whether the contract price paid by the MNC is sufficient to pay at least the legally-required wages to workers. Then, setting aside the question of defining a "livable wage," it becomes a matter of economics to determine whether the difference between a "livable wage" and the legally-required wage is a reasonable cost.

3. *Efficient Monitoring*

As discussed in Part II, monitoring efforts are expensive, methodologically challenging, and politically charged. All of these problems can be lessened through collaborative efforts. When multiple MNCs contract with a common supplier, both the corporations and the supplier will benefit from the lower cost and administration of shared monitoring infrastructure.²⁶⁷ Alternatively, MNCs can avoid "fox-guarding-the-henhouse" problems by participating in reputable third-party monitoring programs that certify factories for achieving standards developed by a broad coalition of stakeholders. For example, the Social Accountability International (SAI) provides certification to companies that comply with the Social Accountability 8000 (SA8000), a voluntary workplace standard based on ILO and UN Conventions.²⁶⁸ To the extent that institutional efforts cannot capture code violations in the day-to-day operations of a factory, MNCs can fill the gap by establishing a grievance system for workers or other stakeholders.²⁶⁹

4. *Effective Enforcement*

The weakest point of the code of conduct structure is the capacity of suppliers to comply, including not only financial capacity but also

²⁶⁶ *Id.* at 2–3 (noting the impact of labor cost increases on retail prices would be lower for products made in other key apparel-exporting countries, such as Cambodia, Bangladesh, China, Indonesia, India, and Pakistan, where labor costs are substantially lower).

²⁶⁷ Nike has expressed interest in sharing resources to monitor commonly used factories and jointly exert pressure to force factories to improve working conditions. Jung, *supra* note 48; see Neef, *supra* note 257 (noting that suppliers facing multiple uncoordinated surveys "simply respond with unverified assurances of compliance").

²⁶⁸ Perez-Lopez, *supra* note 33, at 95-12. As of September 30, 2009, 2,093 facilities have received SA8000 certification. Social Accountability Accreditation Services, Certified Facilities List, <http://www.saasaccreditation.org/certifacilitieslist.htm>.

²⁶⁹ Webb, *supra* note 260.

organizational and systematic infrastructure.²⁷⁰ A recent study of Nike's monitoring practices concluded that supplier capacity can be strengthened through greater instrumental assistance from MNCs and collaboration with other stakeholders to institute long-term systemic changes.²⁷¹ Researchers noted that improvements in labor conditions in Nike factories varied with the ability of the local government to enforce labor laws, the age and size of the factory, and the relationship between Nike and the particular supplier.²⁷² The study found that monitoring alone produced limited results, but greater frequency of interaction between Nike sourcing, production, and quality personnel and the factory had a positive correlation.²⁷³ Based on these findings, the study recommends that MNCs and labor rights nongovernmental organizations (NGOs) supplement their monitoring efforts "by providing suppliers technical and organizational assistance to tackle some of the root causes of their poor working conditions."²⁷⁴ It further recommends that MNCs collaborate with developing country authorities to expand their capacity and legitimacy to enforce their own labor laws.²⁷⁵

Since the expiration of the WTO Agreement on Textiles and Clothing in 2005, which imposed import quotas on individual countries, MNCs can now contract with a smaller number of larger suppliers.²⁷⁶ This development enables MNCs to build long-term relationships with selected factories, thus ensuring a better return on investments in building the supplier capacity. At the same time, it provides an incentive for the supplier to comply with labor standards in the interest of maintaining a lucrative relationship with the MNC.²⁷⁷

B. Sustainable Codes of Conduct Maximize Long-Term Corporate Profits

In the face of liabilities that arise from maintaining a code of conduct, some MNCs may be tempted to pull back in several ways: making codes less stringent and therefore easier for suppliers to comply, adding express disclaimers that right-to-monitor provisions neither create a duty to monitor nor third-party beneficiaries, eliminating references to

²⁷⁰ Richard M. Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LAB. REL. REV. 3, 22 (2007). For a list of additional studies with similar findings, see Phillips & Lim, *supra* note 45, at 339 n.21.

²⁷¹ Locke et al., *supra* note 270, at 22.

²⁷² *Id.* at 20.

²⁷³ *Id.* at 21–22 (observing that some suppliers who collaborated with Nike personnel to introduce new quality improvement and lean manufacturing systems improved the efficiency and quality of their own operations, including better treatment of workers).

²⁷⁴ *Id.* at 22.

²⁷⁵ *Id.*

²⁷⁶ MURPHY & MATHEW, *supra* note 26, at 3–4.

²⁷⁷ Baue, *supra* note 56.

codes from supplier contracts, or eliminating the codes altogether.²⁷⁸ This approach may not help improve labor conditions, but arguably MNCs cannot be held responsible for sweatshop practices from which they aggressively distance themselves.

Critics of sweat-free advocates are correct to say that increasing labor standards has a cost. However, a cost-benefit analysis also calculates the broader costs of maintaining sweatshops, including the financial consequences of damage to brand image, millions of dollars annually to monitor and then defend an unenforced code of conduct, turnover costs of company employees and factory workers, time billed to corporate counsel and legal defense,²⁷⁹ and the costs of federal or international regulations that may not exist but for the failure of self-regulation. Stated inversely, the statistically positive association between CSR and financial performance is well documented.²⁸⁰

VI. CONCLUSION

This is an opportune time for MNCs to re-examine their strategies to insulate themselves from litigation and preserve the private order of self-regulation. In the last five years, stakeholders have pushed legislatures and courts to apply and expand the law to eliminate the sweatshop trade in the United States. Civil society organizations continue to expose MNCs and harm their brand reputation. The Obama Administration has expressed a willingness to prioritize social justice and may be less inclined than the former administration to intervene in court on behalf of MNCs. In light of costs posed by current and potential litigation theories, legislative developments, and public demand, MNCs that rely on international supply chains will benefit from new strategies that improve labor conditions more directly and efficiently. Improved compliance with codes of conduct offers a better return on the MNCs investment of capital in developing nations by calming consumer concerns, building a mutually supportive relationship with other stakeholders, and reducing the risk of costly litigation.

²⁷⁸ This advice was offered by a large, international law firm to American companies doing foreign sourcing and outsourcing. See PROSKAUER ROSE LLP, SUPPLIER CODES OF CONDUCT AFTER *DOE V. WAL-MART 2* (2005), available at http://www.proskauer.com/news_publications/newsletters/intl_hr/2005_12_01/_res/id=sa_PDF/10434-120005-International%20HR%20Best%20Practices-ne-v2.pdf.

²⁷⁹ If plaintiffs have jurisdiction in U.S. courts for injuries caused by subjecting workers to sweatshop conditions, MNCs will lose the benefit of the current cost-saving strategy to shift manufacturing contracts to countries with the cheapest and least stringent labor regulations.

²⁸⁰ Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 *ORG. STUD.* 403, 427 (2003), available at <http://oss.sagepub.com/cgi/reprint/24/3/403.pdf>.